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No. 95-131

In The

Supreme Court of the United States

October Term, 1995

MISANO DI NAVIGAZIONE, S.P.A.,

Petitioner,

versus

CORAZON G. ENERIA, INDIVIDUALLY, AND AS GUARDIAN OF ELISEO E. ENERIA, AND AS TUTRIX OF ELCY ENERIA, LOUIE ENERIA, AND CAROL ENERIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Corazon G. Eneria, individually, and as guardian of Eliseo Eneria, and as Tutrix of Elcy Eneria, Louie Eneria, and Carol Eneria, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner Misano di Navigazione, S.p.A.

STATEMENT OF THE CASE

Respondent disagrees with Petitioner's "Statement of the Case". No factual determinations have been made by

either the State District Court, the State Appellate Court, or the Louisiana Supreme Court other than " . . . the facts of this case, as related in the aforementioned documents, place the actions of the defendant amply within the jurisdiction of the district court who issued the attachment, and we find no error in the issuance of same." (Writ Denial of Court of Appeal for the Fifth Circuit, State of Louisiana, Petitioner's Appendix p. 698)

The only undisputed facts are the admissions made by Petitioner and Respondent from the pleadings filed in the State District Court and those which are contained in the argument of counsel at two post-attaching hearings which may be summarized as follows:

The Defendants SPEI Leasing, S.p.A. and Misano di Navigazione, S.p.A., foreign corporations, are the registered owner and beneficial owner/bareboat charterer of the M/T Nevada, formerly the M/T Mare di Kara. Eliseo E. Eneria was severely injured on March 3, 1993, on the M/T Mare di Kara when the toplift wire of the starboard provision crane broke, causing the crane to collapse and strike Mr. Eneria while the vessel was in Genoa, Italy. On January 13, 1995, Respondent presented a detailed verified petition to a district court judge of the 29th Judicial District Court of the State of Louisiana seeking an order of attachment of Petitioner's property.

After carefully reviewing the detailed petition and verification and questioning Respondent's counsel as to the evidence supporting the propriety of the order seeking a maritime attachment to obtain *quasi in rem* jurisdiction, the district judge signed the order and the pleadings were then filed with the Clerk of Court. The contention

by Petitioner that " . . . the order to attach the vessel was signed and filed 13 minutes after the petition was filed" is incorrect. (Petitioner's Appendix, pp. 13-14) As is the custom in the 29th Judicial District Court, the verified petition and order were submitted to the district judge for his consideration prior to the filing with the Clerk; and Petitioner's Appendix, pp. 13-14, bearing the stamp containing the date and time filed with the Court, only establishes that it took the Clerk of Court 13 minutes to process the petition and order after signing by the district judge.

The writ of attachment was not executed until January 17, 1995, when the M/T Nevada was docked in St. Charles Parish. The writ of attachment was executed prior to the loading of the vessel. On Friday, January 20, 1995, Petitioner Misano requested a post-attachment hearing to dissolve the attachment. (Petitioner's Appendix pp. 15-16) The motion did not specify any basis for dissolving the writ and was filed pursuant to Louisiana Code of Civil Procedure Article 3506, which allows a defendant to immediately obtain the dissolution of a writ of attachment or sequestration "unless the plaintiff proves the grounds upon which the writ was issued".

A post-attachment hearing was set for Tuesday, January 24, 1995. On Monday, January 23, 1995, Petitioner filed its "Memorandum in Support of Dissolution of Writ of attachment" contending that (1) Respondent failed to follow the requirements of the Louisiana statute seeking the attachment, (2) Respondent had "no cause of action against the parties", and (3) the maritime attachment procedure could not be used to obtain personal jurisdiction over Petitioner. (Petitioner's Appendix pp. 17-18) An

extensive post-attachment hearing was held in open court on January 24, 1995, at which time Petitioner stated it was not " . . . arguing that the prejudgment attachment statute is unconstitutional as written" but only that it was improperly applied in this case. A copy of the complete transcript of the testimony of the first post-attachment hearing is contained in the Appendix. (Appendix pp. 1 to 21)

At the first post-attachment hearing, Petitioner argued on three separate occasions that jurisdiction was proper in a federal court, but not in a state court. (Appendix pp. 14, 17, and 18) At the conclusion of the post-attachment hearing, Respondent was given one day in which to file a memorandum and Defendants to file additional exceptions and a second post-attachment hearing was set for January 27, 1995, to consider any additional evidence, arguments by counsel, and exceptions to be filed by the defendants.

The second post-attachment hearing was held on January 27, 1995, and the transcript of that hearing is contained in the appendix (Appendix pp. 22 to 49) At the conclusion of the second post-attachment hearing, the State District Court denied Petitioner's motion to dissolve the writ of attachment and overruled Petitioner's exceptions. (Petitioner's Appendix pp. 53-55) Petitioner's application for supervisory writs to the Court of Appeal for the Fifth Circuit and subsequently the Louisiana Supreme Court were denied. (Petitioner's Appendix pp. 69, 94) In denying Petitioner's application for supervisory writs, the order of the Court of Appeal for the Fifth Circuit of the State of Louisiana stated in part:

> . . . Our examination of the transcript and the application before us, as well as the response by the plaintiff, has convinced us that the facts of this case, as related in the aforementioned documents, place the actions of the defendant amply within the jurisdiction of the district court who issued the attachment, and we find no error in the issuance of same. La. C.C.P. art. 9; La. C.C.P. art. 3541. (Petitioner's Appendix p. 69)

The factual determination that "the actions of defendant" place it "amply within the jurisdiction of the district court who issued the attached . . . " are supported by the record and sustain the constitutional propriety of the maritime attachment. The evidence submitted by Respondent to the district court and attached to its opposition briefs to the State Appellate Court and State Supreme Court included Petitioner's actions in making 29 voyages to United States' ports in the last three years – six of those voyages being to the State of Louisiana. (App. 50) The M/T Nevada called upon Louisiana ports in January of 1995, August of 1994, February of 1994, November of 1993, March of 1993, and November of 1992. Petitioners admitted in open court that on the last call alone to a Louisiana port, it expected to earn $450,000 as its fee for transporting petroleum products. (App. 17)

In addition to earning a fee of $450,000, Petitioner was required to hire a local shipping agent to manage the vessel while it was in port, numerous river pilots to assist the vessel in traversing Louisiana waters, as well as other suppliers which provided necessities for the vessel. Each and every time this vessel called upon the Port of New Orleans during the last three years, it was required to retain the services of all the types of vendors described

above. Each and every time the vessel entered the Port of New Orleans, it likewise earned significant income from the transportation and delivery of Petroleum Products. Although shipping rates have declined over the last three years, if one assumes that the vessel earned only $450,000 during each of its voyages into the Port of New Orleans, then it becomes clear that this vessel has earned nearly $2,700,000 as a result of its activities within this State.

Respondent also introduced into evidence the "Extract from Deck Log Book" of the M/T Nevada which clearly established that the accident occurred because of an unseaworthy condition of the vessel, namely " . . . because of breaking topping lift wire, the crane fell down againts [sic] ship side and rails. While smashing against the rail, the crane hit Oiler Eliseo Eneria . . . ". (App. 52) Respondents also introduced numerous medical records establishing that Eliseo Eneria has severe and permanent brain damage and "that he should be treated and rehabilitated in the United States since the Philippines do not have the personnel and facilities for such a comprehensive rehabilitation program.". (App. 69)

The Court of Appeal for the Fifth Circuit of the State of Louisiana had the complete record before it, as did the Louisiana Supreme Court, when the Appellate Court stated that the record " – as related in the aforementioned documents, placed the actions of the defendant amply within the jurisdiction of the district court who issued the attachment, . . . ". While no other factual determinations have been made, it is submitted that the record of this proceeding clearly establishes that the maritime attachment was proper in this case. The detailed verified petition filed by Respondent did not specify the general

damages sought because state procedural law, like federal procedural law, does not allow the itemization of unliquidated damages. La. C.C.P. art. 893; F.R.C.P. 8(a), 9(g).

SUMMARY OF THE ARGUMENT FOR DENYING THE WRIT

I. On January 13, 1995, Respondent filed a detailed verified petition seeking an order of attachment to attach the Petitioner's property, the M/T Nevada. The M/T Nevada was the source of the underlying controversy and the vessel's equipment caused the injury in question when the crane on board collapsed striking the Respondent. The detailed verified petition was submitted to the district court judge who, after considering it and questioning counsel, signed the order authorizing the issuance of the non-resident writ of attachment. After the property was attached on January 17, 1995, Petitioner requested a post-attachment hearing on January 20, 1995, which was held on January 24, 1995. At the first post-attachment hearing, Petitioner admitted that jurisdiction would be proper in a federal court and contended that the provisions of Louisiana law had not been properly followed. A second post-attachment hearing was held on January 27, 1995, at which time the district court denied Petitioner's motion to dismiss the attachment.

Evidence adduced at the post-attachment hearings included the extract of the deck log of the M/T Nevada showing that the vessel caused the accident, medical records showing the extent of Respondent's brain damage, voyage records of the vessel showing 29 voyages to

the U.S. and six voyages to Louisiana in the preceding three years in which the Petitioner earned a minimum of $2,700,000. The contacts of the Petitioner in Louisiana clearly satisfied any minimum contact or litigation-relatedness requirements of the due process clause in this maritime action.

II. Louisiana's sequestration and attachment has been found to meet all constitutional requirements. *Mitchell v. W.T. Grant Co.*, 416 U.S. 60, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974). Louisiana procedural law provides that a bond of $250 shall be provided upon filing a complaint, but that the defendant may move to increase that security. Louisiana's procedural law also provides for the awarding of damages if the writ of attachment is wrongfully issued.

III. Louisiana's non-resident attachment law in no way violates the commerce clause of the United States Constitution. Louisiana's pre-judgment attachment law in a maritime context is very similar to that contained in the Supplemental Rules for Certain Admiralty and Maritime Claims, specifically Rules B and C, which have been consistently held to be constitutional.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S ACTIONS IN THE STATE OF LOUISIANA SATISFIED ANY "MINIMUM CONTACTS" OR "LITIGATION-RELATEDNESS" REQUIREMENTS OF *INTERNATIONAL SHOE* AND *SHAFFER*.

In *Shaffer v. Heitner*, 433 U.S. 186, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977), a non-maritime action, this Court held *in rem* and *quasi in rem* actions must be evaluated according to the minimum contact standards of *International Shoe*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In doing so, this Court did not impose a broad rule of law applicable to transitory maritime actions. This Court specifically limited its holding, stating:

> This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, *when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction.* In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State. The presence of property may also favor

> jurisdiction in cases such as suits for injury suffered on the land of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership.
>
> *It appears, therefore, that jurisdiction over many types of actions which now are or might be brought in rem would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the International Shoe standard.* For the type of quasi in rem action typified by Harris v. Balk and the present case, however, accepting the proposed analysis would result in significant change. These are cases where the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. 43 L.Ed.2d at 700. (Emphasis added).

It is clear from the passage quoted above, that this Court did not intend to limit the traditional exercise of *quasi in rem* jurisdiction in those cases where the property subject to a state court attachment was directly related to the plaintiff's claims against the nonresident defendant. This is exactly the type of case before this Court. The property seized, the vessel M/T Nevada, is directly related to the Respondent's claims. The Respondent alleges that the property itself was defective (unseaworthy) and this defect caused his harm.

In *Shaffer*, this Court also stated:

> We are left, then, to consider the significance of the long history of jurisdiction based solely on the presence of property in a State. Although the theory that territorial power is both essential to and sufficient for jurisdiction has been undermined, *we have never held that the presence of property in a State does not automatically confer jurisdiction over the owner's interest in that property*. This history must be considered as *supporting the proposition that jurisdiction based solely on the presence of property satisfies the demands of due process*, cf. Ownbey v. Morgan, 256 U.S. 94, 111, 41 S.Ct. 433, 438, 65 L.Ed. 837 (1921), but it is not decisive.

The Court continued in footnote 38:

> To the contrary, in Pennington v. Fourth National Bank, 243 U.S. 269, 271, 37 S.Ct. 282, 61 L.Ed. 713 (1917), we said:
>
> *"The Fourteenth Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a State possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property.* Indebtedness due from a resident to a non-resident of which bank deposits are an example is property within the State. Chicago, Rock Island & Pacific Ry. Co. v. Sturm, 174 U.S. 710, 19 S.Ct. 797, 43 L.Ed. 1144. It is, indeed, the species of property which courts of the several States have most frequently applied in satisfaction of the obligations of absent debtors. Harris v. Balk, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023. Substituted service on a non-resident by publication furnishes no legal basis

> for a judgment in personam. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565. *But garnishment or foreign attachment is a proceeding quasi in rem.* Freeman v. Alderson, 119 U.S. 185, 187, 7 S.Ct. 165, 30 L.Ed. 372, 373. *The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power."*
>
> See also Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 193, 61 S.Ct. 513, 517, 85 L.Ed. 725 (1941). 53 L.Ed.2d at 702 (Emphasis added.)

It is clear, then, that this Court in *Shaffer* did not impose a limitation on the states' traditional exercise of *quasi in rem* jurisdiction over the property of a nonresident defendant in situations where the offending property was found and seized or attached within a state's territorial jurisdiction. Under this scenario, as is presented by this case, "[t]he Federal Constitution presents no obstacle to the full exercise of this power."

In yet another non-maritime case, *Burnham v. Superior Court of California*, 495 U.S. 604, 109 L.Ed.2d 631, 110 S.Ct. 2105 (1990), this Court held personal jurisdiction to be proper based upon the personal service upon a nonresident who was physically within the jurisdiction of the state court and explained its holding in *Shaffer*:

> Shaffer, like International Shoe, involved jurisdiction over an *absent defendant*, and it stands for nothing more than the proposition that when the 'minimum contact' that is a substitute for physical presence consists of property ownership it must, like other minimum contacts, be related to the litigation. Petitioner wrenches out

> of its context our statement in Shaffer that 'all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny,'
>
> * * *
>
> Shaffer was saying, in other words, not that all bases for the assertion of in personam jurisdiction (including, presumably, in-state service) must be treated alike and subjected to the 'minimum contacts' analysis of International Shoe; but rather that quasi in rem jurisdiction, that fictional 'ancient form,' and in personam jurisdiction, are really one in the same and must be treated alike – leading to the conclusion that quasi in rem jurisdiction, i.e., that form of in personam jurisdiction based upon a 'property ownership' contact and by definition unaccompanied by personal, in-state service, must satisfy the litigation – relatedness requirements of International Shoe.

As was noted above, this Court in *Shaffer* held that there must be certain minimum contacts that the defendant has with a state if the property attached is not related to the underlying cause of the litigation. That was the situation in *Dosfer Intercontinental v. Amerwood International*, 468 So.2d 634 (La.App. 4th Cir. 1985), where the non-resident's property had nothing to do with the cause of action:

> The court finds that the property under attachment is completely unrelated to the respondent's cause of action. . . .

In the case before this Court, the M/T Nevada, the property under attachment, is the same property that caused

the injury to Eliseo E. Eneria because of the defective crane. In such cases, *quasi in rem* jurisdiction has always been held to be proper. In *John N. John, Jr., Inc. v. Brahma Petroleum Corp.*, 699 F.Supp. 1220, 1222 (W.D.La. 1988), the court stated:

> . . . *Shaffer* held that the due process requirement of 'minimum contacts' applies also to quasi-in-rem jurisdiction. To sustain such jurisdiction, a connection must exist among the defendant, the forum and the claim. The Court stressed that if the only connection between the defendant and the forum is that the Defendant's property is in the state and that the claim is unrelated to the property, no jurisdiction exists. *Shaffer* is inapposable here. In *Shaffer* the sequestered property was unrelated to the cause of action; in this case, the property attached is the very subject of the cause of action.

Similarly, in *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne De Navigation*, 605 F.2d 648 (2d Cir. 1979), the court held proper a non-resident attachment under state law because the property attached was related to the claim.

As found by the Fifth Circuit Court of Appeal for the State of Louisiana:

> The facts of this case . . . place the actions of the defendant amply within the jurisdiction of the district court who issued the attachment. . . .

The facts of this case clearly satisfy any minimum contact/litigation-relatedness requirement. It is not in dispute that the attached property itself (M/T Nevada) was

"the source of underlying controversy between the plaintiff and defendant." The injury occurred because of the unseaworthiness of the M/T Nevada, naming the collapsing of the crane striking Mr. Eneria. It is not in dispute that on the voyage upon which the M/T Nevada was attached, it was earning $450,000 by taking cargo from the State of Louisiana. It is also not in dispute that the M/T Nevada made 29 voyages to U.S. ports in the preceding three years, six of those voyages being to the State of Louisiana, during which time it earned at least $2,700,000 from voyages to or from Louisiana. The facts of this case clearly indicate that the property and petitioner had sufficient "minimum contact" and "litigation-relatedness" to satisfy the requirements of *Shaffer* and *International Shoe*.

Also, as a matter of law, the Louisiana *quasi in rem* statute does not conflict with *Shaffer*. Personal jurisdiction is defined in the Louisiana Code of Civil Procedure as follows:

> Art. 6. Jurisdiction over the person
>
> Jurisdiction over the person is the legal power and authority of a court to render a personal judgment against a party to an action or proceeding. This jurisdiction must be based upon:
>
> (1) The service of process on the defendant, or on his agent for the service of process;
>
> (2) The service of process on the attorney at law appointed by the court to defend an action or proceeding brought against an absent or incompetent defendant who is domiciled in this state; or

(3) The submission of the party to the exercise of jurisdiction over him personally by the court, or his express or implied waiver of objections thereto.

(Louisiana Code of Civil Procedure, Article 6)

The Louisiana *quasi in rem* statute which was in effect at the time of the attachment read as follows:

Art. 9. Same; quasi in rem; attachment

A court which is otherwise competent under the laws of this state has jurisdiction to render a money judgment against a nonresident not subject personally to the jurisdiction of the court only if the action is commenced by an attachment of his property in this state. Unless the nonresident subjects himself personally to the jurisdiction of the court, the judgment may be executed only against the property attached.

(The 1995 Legislature by Act 1104 amended Article 9 to remove therefrom the language "not subject personally to the jurisdiction of the court only".) (See App. 65.)

Article 9 of the Louisiana Code of Civil Procedure makes it absolutely clear that unless there is personal jurisdiction, "the judgment may be executed only against the property attached." While a *quasi in rem* attachment is properly labeled an *in personam* action, there is and always have been different standards in maritime actions to obtain a personal judgment exceeding the value of the property and a *quasi in rem* judgment valid only to the extent of the property attached.

The non-resident attachment in this maritime case is virtually identical to the foreign writ of attachment that

has long been part of the maritime law. Attachment proceedings in maritime actions have been consistently held constitutional and necessary because of the uniqueness of maritime commerce. In *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 825, 6 L.Ed 369 (1825), this Court specifically held that a writ of maritime attachment is available in the case of a maritime tort in an action *in personam*. The first set of Admiralty Rules promulgated by this Court in 1844 recognized the rules for maritime attachment of a non-resident's property. 44 U.S. (3 How.) iii-xiv (1845). Thirty years later, in *Atkins v. Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 303 (1874) this Court stated that maritime attachment "has prevailed during a period extending as far back as the authentic history of [admiralty] tribunals can be traced . . . ".

In 1890, *In Re Louisville Underwriters*, 134 U.S. 488, 33 L.Ed. 991, this Court held that a libel *in personam* may be maintained anywhere a monition can be served upon the libellee, or an attachment made of the libellee's property. In doing so, this Court approved the Public Statute of Louisiana of February 26, 1877, and further stated the uniqueness of the maritime context which justified these special procedures:

> Courts of admiralty are established for the settlement of disputes between persons engaged in commerce and navigation, who, on the one hand, may be absent from their homes for long periods of time, and, on the other hand often have property or credits in other places. In all nations, as observed by an early writer, such courts 'have been directed to proceed at such times, and in such manner, as might best consist with the opportunities of trade, and least hinder

> or detain men from their employments.' In the same spirit this court has more than once said: 'Courts of admiralty have been found necessary in all commercial countries, for the safety and convenience of commerce and the speedy decision of controversies, where delay would often be ruin.' To compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel in rem) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons or his goods or credits attached, would not only often put them to great delay, inconvenience and expense, but would in many cases amount to a denial of justice.

In *East Asiatic Co. v. Indomar*, 422 F.Supp. 1335 (S.D.N.Y. 1976), 1976 AMC 2039, Judge Tenney opined that it would be impossible to simultaneously obtain both *in personam* jurisdiction and *quasi in rem* jurisdiction, stating:

> . . . . Nor can there logically be such a case, for such a holding would reduce maritime attachment to nothing more than a security lien. This cannot be done, for '[i]t is crystal clear that the historical purpose of the writ of foreign attachment is to compel the respondent's appearance. Although an incidental purpose thereof is to supply the libelant with security, this objective can only be obtained as an adjunct to jurisdiction.' . . .

There is no personal jurisdiction in the instant case because Respondent did not comply with the provisions of Article 6 of the Louisiana Code of Civil Procedure by effectuating service of process upon Petitioner. Of course,

personal jurisdiction could subsequently be obtained, either by valid service of process upon Petitioner or by Petitioner making a general appearance. *Atkins v. Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 298 (1873) (an action commenced by maritime attachment and defendant made general appearance which " . . . warranted a decree in personam for the amount adjudged to the libelants").

Perhaps most amazing is Petitioner's repeated contention in the district court that jurisdiction would be proper in a federal tribunal, but not a state tribunal. (Appendix pp. 14, 17, 18 and 39) Clearly Respondent had the right to utilize the Supplemental Rules for Maritime and Admiralty Proceedings in a federal court, specifically Rule B, which specifically authorizes the utilization of state attachment law or Rule C to perfect a lien on the vessel. These Rules allowing attachment have been constantly held constitutional and not in violation of *Shaffer*. *See, e.g., Trans-Asiatic Oil Ltd., S.A. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1984); *Amoco Overseas Oil Co. v. Campagnie Nationale Algerienne de Navigation*, 605 F.2d 648, 1979 AMC 1829 (2d Cir. 1979); *Bethlehem Steel Corporation v. Valiant King*, 1977 AMC 1719 (E.D.Pa. 1974); *Amstar Corp. v. S/S Alexandros T*, 664 F.2d 904, 1981 AMC 2697 (4th Cir. 1981); *Merchants National Bank of Mobile v. The Dredge General G.L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981); *Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 1982 AMC 2330 (9th Cir. 1982); *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottachi S.A. de Navegacion*, 732 F.2d 1543, 1984 AMC 2113 (11th Cir. 1984).

At the heart of a due process analysis is the question of whether it is reasonable to hale a nonresident into court to defend an action in a particular forum. One of

the considerations which is crucial to answering this question is whether the nonresident defendant should have reasonably expected to be haled into court in a distant forum. The inconvenience of litigating in the forum is an issue to be weighed in the analysis.

In this maritime case the Petitioner admits that it could have easily and properly been haled into the federal court for the Eastern District of Louisiana. The question which must be answered is how can it be admitted by the Petitioner that it can lawfully and constitutionally be subjected to the jurisdiction of a United States District Court in this State but not a Louisiana State District Court. If the convenience of litigating in the forum is the important issue, then it cannot be argued that litigating in a federal court in the state is convenient, but litigating in a state court located in the same district is not!

The fact of the matter is that a maritime shipowner which is engaged in international maritime commerce is *always* aware of the risk that it may be haled into court in a distant forum. The court in *Trans-Asiatic Oil, Ltd. v. Apex Oil Company*, 743 F.2d 956 (5th Cir. 1984) discussed the risk of a maritime shipowner being haled into court in a distant forum. Such a risk does not offend due process:

> In admiralty *"traditional notions of fair play and substantial justice" will often be best served by permitting suitors to seek redress in districts where the shipowner's goods or credits can be found, since the vessel itself may be in a distant port and the owner's home may likewise be far away. The need for special procedures for resolving disputes in admiralty has long been recognized:*

Courts in admiralty are established for the settlement of disputes between persons engaged in commerce and navigation, who, on the one hand, may be absent from their homes for long periods of time, and on the other hand, often have property or credits in other places. In all nations, as observed by an early writer, such courts "have been directed to proceed at such times and in such manner, as might best consist with the opportunities of trade, and least hinder or detain men from their employments." . . . *To compel suitors in admiralty (when a ship is abroad and cannot be reached by a libel in rem) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons or his goods or credits attached, would not only often put them to great delay, inconvenience, and expense, but would in many cases amount to a denial of justice.*

In re Louisville Underwriters, 134 U.S. 488, 493, 10 S.Ct. 587, 589, 33 L.Ed. 991 (1890). Thus the Second Circuit has stated that, *"[b]ecause the perpetrators of maritime injury are likely to be peripatetic . . . maritime actors must reasonably expect to be sued where their property may be found."* Amoco Overseas Oil v. Compagnie Nationale Algerienne, 605 F.2d 648, 655 (2d Cir.1979).

As a participant in maritime commerce, Apex *must expect to be sued wherever its credits and property may be found.* Apex objects that because it has a corporate office in Missouri, it should be sued there, not in Puerto Rico. But as we stated supra, the convenience of defendant is more properly addressed in a motion for change of venue under 28 U.S.C. Sec. 1404 (1982). Apex could post a bond for the attached credits under

> Rule E(5) of the Supplemental Rules and then seek a transfer of the case to Missouri. *To disapprove maritime attachments on constitutional grounds so as to require that plaintiffs sue corporate entities only in their home districts would expose plaintiffs, who might often be seamen or suppliers at some distant port, to the vagaries of "[i]ntricate corporate shells . . . employed to disguise the ownership of shipping assets."* Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion, 732 F.2d 1543, 1548 (11th Cir.1984). We hold that the exercise of personal jurisdiction over the defendant based on the attachment of credits in the District of Puerto Rico does not violate due process. 743 F.2d at 960. (Emphasis added.)

In this particular case, Petitioner was immediately notified of the attachment of its property. Immediately following this notice, Petitioner availed itself of the provisions of Louisiana law providing for a prompt post-attachment hearing. At this post-attachment hearing Petitioner was able to challenge in all respects the validity of the attachment of its property. This is all that the due process clause requires in a maritime case such as this and therefore the Louisiana attachment procedure does not violate any constitutional safeguards.

II. LOUISIANA'S NON-RESIDENT ATTACHMENT PROCEDURE IS IN COMPLIANCE WITH ALL DUE PROCESS REQUIREMENTS.

Louisiana prejudgment procedure law is contained in Book 7, Title 1, Chapter 1, of the Louisiana Code of Civil

Procedure, and is entitled "Attachment and Sequestration". The same general rules are applicable for attachment and sequestration and are contained in Code of Civil Procedure Articles 3501 to 3514. Special rules are applicable to non-resident attachment in Code of Civil Procedure Articles 3541 to 3545.

In *Mitchell v. W.T. Grant Co.*, 416 U.S. 60, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974), a non-maritime action, this Court specifically upheld the constitutionality of Louisiana's sequestration laws and attached as Appendix 2 to its opinion the relevant Articles of the Louisiana Code of Civil Procedure. Those articles have not changed and are applicable to attachment proceedings. As this Court stated in *Mitchell*, " . . . this statutory procedure affects a constitutional accommodation of a conflicting interest of the parties." One year later, in *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975), this Court again pointed to the Louisiana statute as one that was constitutional.

Louisiana Code of Civil Procedure Article 3544 only requires a bond of $250.00 for the issuance of a non-resident writ of attachment. This is $250.00 more than is required by Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims which have consistently been held constitutional in federal proceedings. Rule E of the Supplemental Rules for Certain Admiralty and Maritime Claims grants the federal court the authority to require the plaintiff, defendant, claimant or other party to post security at any time. Louisiana Code of Civil Procedure Article 3544 allows the court to increase the security to any amount not exceeding the amount of the demand and Code of Civil Procedure Article 3506 allows

for damages for the wrongful issuance of a writ of attachment or sequestration.

Petitioner never asked for the security to be increased and only availed itself of its right to immediate post-attachment hearings, at which time Respondent formally submitted into evidence *prima facie* evidence of liability and the damages sustained by Respondent.

This Court's decision in *Connecticut v. Doehr*, 501 U.S. 1, 115 L.Ed.2d 1, 111 S.Ct 2105 (1991), repeatedly cites *Mitchell* with approval noting the differences in the Louisiana law that led to upholding its constitutionality:

> Those differences included Louisiana's provision of an immediate postdeprivation hearing along with the option of damages; the requirement that a judge rather than a clerk determine that there is a clear showing of entitlement to the writ; the necessity for a detailed affidavit; and an emphasis on the lienholder's interest in preventing waste or alienation of the encumbered property. . . .

Connecticut v. Doehr was a non-maritime case involving a Connecticut statute authorizing the pre-judgment attachment of real estate and is certainly not remotely related to a maritime writ of attachment that is necessary to obtain jurisdiction in circumstances that are unique to the maritime world. The statute at issue in *Connecticut v. Doehr* made no provisions for the posting of a bond contrary to both Louisiana procedural law and the Supplemental Rules for Certain Admiralty and Maritime Claims. This Court found that the Connecticut statute allowing for double damages for suits that are commenced without probable cause "fails to make up for the lack of the

bond". In Louisiana procedural law, not only are provisions made for the posting of a bond, and increasing the security, but Louisiana procedural law allows for damages for the wrongful issuance.

More so, as in *Mitchell*, Louisiana Code of Civil Procedure Article 3511 provides for a privilege from the time of seizure if judgment is rendered maintaining attachment.

III. LOUISIANA'S NON-RESIDENT ATTACHMENT LAW IS NOT A BURDEN ON FOREIGN COMMERCE PROHIBITED BY THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

Petitioner's final argument contends that Louisiana's attachment law violates Article I, Section 8, Clause 3 of the United States Constitution. Again, Petitioner cites numerous non-maritime cases in support of its novel argument. Article I, Section 8, Clause 3 of the Constitution provides that Congress has the power "To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." The Louisiana law pertaining to attachment and sequestration contained in La. C.C.P. art. 3501 makes no attempt whatsoever to "regulate" commerce and is certainly no burden. Indeed, this Court has considered Louisiana law on attachment and sequestration in a number of contexts, one of the first being the case of *Leon v. Galceran*, 11 Wall. 185, 20 L.Ed.74, 78 U.S. 75 (1870). In that case, this Court held that the

issuance of a writ of sequestration was proper and specifically allowed under the "savings to suitors clause" presently 28 U.S.C. 1333, and that a state court is proper in all cases where the common law is competent to give it and that the common law is as competent as the admiralty to give a remedy in all cases where the suit is "in personam" against the owner of the property. This Court held the sequestration of defendant's vessel proper and the bond posted for the release of the vessel to be subject to the execution of the judgment.

Forty-five years later, this Court reaffirmed the propriety of state court attachments in noting the distinction between *in rem* and *quasi in rem* jurisdiction in *Rounds v. Cloverport Foundry & Machine Co.*, 237 U.S. 303, 35 S.Ct. 596, 59 L.Ed. 966 (1914). This Court held that the issuance of a writ of attachment ancillary to an *in personam* suit and the attachment of defendant's vessel to be a proper exercise of *quasi in rem* jurisdiction.

More recently the United States Court of Appeals for the Fifth Circuit has specifically held that Louisiana statutes for service of process are "in no way contrary to federal admiralty jurisdiction or the commerce clause." *S.S. Philippine Jose Abad Santos, et al. v. Jessie P. Bannister*, 335 F.2d 595 (1964). The Fifth Circuit noted that the Federal Rules of Civil Procedure specifically authorize service of process as provided for in State law. See F.R.C.P. 4. Equally important is the fact that Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims specifically provides that a plaintiff may "invoke the remedies provided by state law for attachment and garnishment or similar seizures of defendant's property."

Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims, like the Louisiana Code of Civil Procedure, requires the review of a verified complaint prior to the issuance of the writ and Rule E allows for the defendant/owner or third party to obtain the release of his vessel, whether the attachment be *quasi in rem* or an arrest in an *in rem* proceeding. Because the federal law as amended in 1985 provides for judicial review prior to issuance of the writ, and the availability of an immediate post-attachment hearing, it has been uniformly held to be constitutional, just as have Louisiana's procedural statutes.

It is now a matter of hornbook law that foreign attachment procedures are valid and not in violation of the United States Constitution. Petitioner's argument overlooks the well established premise that the commerce clause creates no individual rights.

> The purpose of the commerce clause is allocation of power between state and national governments, not protection of individuals from abusive government authority.

White Mountain Apache Tribe v. Williams, 810 F.2d 844, 849 (9th Cir 1985), cert. denied, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987). It is well established that the proper analysis of the propriety of a law is made under the due process and equal protection clauses of the Constitution, not the commerce clause. *International Organization of Master, Etc. v. Andrews*, 831 F.2d 843 (9th Cir. 1987). The Louisiana law of non-resident attachment meets all of those due process and equal protection requirements. Defendant may not rewrite over 200 years of jurisprudence regarding attachment of vessels nor ignore the scholarly publications

recognizing the propriety of a non-resident attachment in a maritime setting such as this and the validity of Louisiana law. See, *The Law of Maritime Personal Injuries*, 4th Ed., Martin Norris (1990), Chapter 11, Section 11.7 "Attachment and Garnishment"; *Benedict on Admiralty*, 7th Ed., Vol. 1, Chapter 8, Section 125, "State Court Attachments and Non Maritime Liens"; *Admiralty Cases and Materials*, 2d Ed., Joe Desha Lucas (1978), Chapter 8, "Attachments in Admiralty"; *Admiralty Cases and Materials*, 2d Edition, Nicholas J. Healy, David J. Sharpe (1986), Chapter 2, "Attachment and Garnishment".

CONCLUSION

This Court has previously held that due process requirements are satisfied by a procedure which provides for certain specific safeguards. The Louisiana procedural scheme only allows for the issuance of a pre-judgment writ of attachment after the allegations supporting the writ of attachment have been referred to and reviewed by a district court judge. In addition, the Louisiana procedural scheme requires the posting of a bond by the party seeking the attachment of a non-resident's property. A post-attachment hearing is immediately available to the defendant. At such a post-attachment hearing, the defendant may contest the validity of the attachment itself and additionally request an increase in the amount of the bond posted by the plaintiff.

All of the constitutional safeguards discussed in prior decisions of this Court are present under the Louisiana procedural scheme. It is respectfully submitted that no

constitutional violation is presented by this case and therefore this Honorable Court should deny Petitioner's application for a writ of certiorari.

Respectfully submitted,

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TWENTY-NINTH JUDICIAL DISTRICT COURT

PARISH OF ST. CHARLES

STATE OF LOUISIANA

CORAZON G. ENERIA, INDIVIDUALLY, AND AS GUARDIAN OF ELISEO E. ENERIA, AND AS TUTRIX OF ELCY ENERIA, LOUIE ENERIA, AND CAROL ENERIA

NUMBER: 43,870

VERSUS

SPEI LEASING SPA AND MISANO DI NAVIGAZIONE SPA

DIVISION: "E"

THE HONORABLE JOEL T. CHAISSON
JUDGE

Transcript of Proceedings

Taken in Open Court at Hahnville, Louisiana, on

January 24, 1995

POST-ATTACHMENT HEARING

APPEARANCES:

REPRESENTING THE PLAINTIFFS:

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REPORTED BY:

MELANIE ROBERT CALLENDER, CCR, RPR
Official Court Reporter
29th Judicial District Court

[p. 2] (PROCEEDINGS)

THE COURT: Good morning, gentlemen.

MR. LAWTON: Morning, Your Honor.

MR. DODSON: Morning, Your Honor.

THE COURT: This is 43,870, Corazon G. Eneria versus Spei Leasing Spa, et al. Let's make an appearance for the record, gentlemen.

MR. LAWTON: David Lawton and Charles Lozes, Your Honor, for Misano di Navigazione.

MR. DODSON: If it please the Court, I'm Richard Dodson for the plaintiff. My co-counsel, Bill Roberts and Gordon Hackman, are not present. They had other commitments.

THE COURT: Okay. Somebody wants to bring me up to date. I think Judge Marino had signed this matter for me, had he not?

MR. DODSON: Yes, Your Honor.

MR. LAWTON: Your Honor, this is an attachment of a ship by – Mr. Dodson represents a plaintiff in the case, in a personal injury case. It's a foreign-flag ship registered in Malta, owned by an Italian company. The accident happened in Italy. It's a [p. 3] Filipino seaman. It has nothing to do with Louisiana, other than the fact that the ship happens to be here at this time. The owner of

this ship, which is Misano, at the time, in 1991, bareboat chartered this ship. In other word's they gave complete control of it over to another company, basically leased it. And the complete obligation for the maintenance, repair, and handling of the ship basically was all this company, just as if they were to lease anything else. This other company had the ship for three years, and after, two years was when this accident occurred. It was this other company, through their managers, that employed the plaintiff. So in early 1994, the ship was taken back from this other company that leased it because they weren't making the payments correctly and so forth. So we're in the position of representing now the owner throughout even though they did not have any operational control, management, or were not employing the plaintiff, or not involved in the repair or maintenance of this equipment at that time. Essentially, we've come in and are moving to dissolve the attachment in this case on several bases. One, that the petition that was filed seeking a writ of attachment was insufficient as a matter of Louisiana procedure, and also constitutionally because it does not have specific verified facts to [p. 4] support the claim, the assertion of jurisdiction, or the amount of the claim. Particularized, there's nothing about jurisdiction in there except a bald statement that this company does business here but is not registered to do business here. In fact, the company does not do business here. It doesn't have any agency or any bank accounts or anything else. But of importance is there are no specific factual allegations. We have a ten million dollar ship with five million dollars of cargo on it. It's being held up now for five or six days. And the fact is it's

under $250 bond and there's not a specific factual allegation in there on why they should be subject to personal jurisdiction. The Supreme Court has held that personal jurisdiction is something that's – that applies in quasi in rem cases like this one. Due process is necessary. You have to have minimum contacts. You have to have some notions of justice and fair play. In this case we have neither. Even if there was those things available, they have to be put into the verified complaint, put specific facts before he can go on a prejudgment basis and attach property. So we're objecting to this on several bases. One is that the petition is just lacking for this kind of prejudgment attachment of property, which has the highest degree of [p. 5] scrutiny, and it's just not sufficient at all to hold up our property without due process. Number two is even if he came in and make these specific factual allegations, the fact is there are none to suffice it even if he wants to present something. So number two is there's no basis for it. In any event, to assert personal jurisdiction and – And number three, if were there to be personal jurisdiction, there's no claim against this owner because under Louisiana law – I mean under general maritime law, as the Louisiana Supreme Court has held in the *Backhus* case we cited to you, if you 're a bareboat charter and you charter to somebody else and there's some kind of transitory condition arises as to unseaworthiness, you're not liable for that. And the Supreme Court of Louisiana has specifically ruled on that issue and said you're not. So even under those facts as well, alternatively, we say, Let our ship go. Let it go elsewhere. Now there are other places where this suit should be filed. It should be filed in the Philippines, which is where

the contract says, under forum selection clauses, that must be pursued before the Philippine Overseas Employment Administration. It could be pursued in Italy where there's an ongoing criminal matter right now, proceedings that Mr. Dodson is familiar with and knows about and involved, which can [p. 6] award civil penalties and civil remedies. And that's ongoing. That was set for trial a couple weeks ago. We understand it was continued, so these are all –

THE COURT: Criminal proceedings against the ship's owners?

MR. LAWTON: I don't know if it's against the ship owner or – It's the master I believe, but I'm not quite certain. Mr. Dodson may be more familiar with that. And I can't speak as to what involvement that has with the ship owner. I just know there was an ongoing procedure, really from Mr. Dodson telling us that there's an ongoing procedure there in Italy. But the accident happened in Italy. It's an Italian beneficial – The company we represent is an Italian company. It's an Italian collective bargaining agreement is involved. So this case should not be in Louisiana. It shouldn't be in Louisiana because the attachment's improper because there's no personal jurisdiction that can be asserted and because it doesn't make any sense for it to be here in Louisiana. And I'll be glad to address any of those notions, Your Honor. And that's the outline of why we're here today.

MR. DODSON: If it please the Court, Your Honor, as a preliminary matter, we filed this suit on [p. 7] Friday, January 13th. And the duty judge of course was Judge Marino, and Your Honor wasn't here; that's why

we submitted the order to him. The writ, if the Court would review the petition which is verified – Prior to that, excuse me, the order issuing the writ of attachment was executed on Tuesday, January the 17th, when the ship came to its dock. And then they continued to load the ship even though they knew it was under attachment. On Friday, January 20th , I – Mr. Lawton and Mr. Lozes filed their motion to dissolve. And we got that at about 3:00 Friday afternoon. But the motion to dissolve did not specify the grounds and we had no idea what their grounds were going to be. And we got their memorandum yesterday afternoon at 3:30 p.m. Now, according to the local rules, Rule 5, they are to file their memorandum with their motion. And I'm not really fussing about that because this is an important matter, but we would ask the Court for the opportunity to – and I'm prepared to argue the case today – but we would ask the Court for the opportunity to file a memorandum with authorities and supporting documentation which we can have filed by, easily, Thursday morning with the Court. And they intend on bringing additional exceptions and motions that – if this matter is not resolved based upon their initial [p. 8] motion here. Let me tell you what the rub in this case is, Judge. We have – I know Mr. Lawton and Mr. Lozes well. And I was thinking, driving down here this morning, that in the last four years I probably have arrested or attached, in state court, over 30 vessels that his firm's been involved with, foreign vessels, foreign seamen, some in this Court, Your Honor, some before Your Honor, some in other courts up and down the river. We've never had any motions to dissolve the attachment. What normally happens is they come in, they move to set

a bond, and we take a letter of undertaking from the insurance company. Well, we got a little problem in this case. They got a ten and a half million dollar ship sitting there but they forgot to pay their insurance premium, so they don't have insurance coverage. So they got to try and wiggle out of this thing some way if they possibly can because the insurance company said we're not going to give you any coverage. And that's the problem why, for the first time in over 30 cases, they filed a motion to dissolve the attachment. And regrettably for the defendants, it's is a good try but it's just not going to work. Because first, as to the constitutional – They say they should have had a hearing before the writ of attachment was issued. That has been spoken to directly by the United States Supreme Court [p. 9] and by the Courts of Appeal of this state. The most recent case, Your Honor – It was just handed down. They say that our prejudgment statute violates due process, et cetera. The most recent decision that was just handed down is *Alessi versus Belanger.* B-E-L-A-N-G-E-R, handed down by the First Circuit, October 7th, 1994, found at 644 Southern Second 788, in which our statute, that we sued under in this case, was directly held constitutional and refutes each and every argument set forth by Mr. Lawton. Just quoting, the First Circuit says in *Mitchell versus W.T. Grant,* a United States Supreme Court case, the U.S. Supreme Court addressed the issue in a suit involving Louisiana's procedures as governed by 3501, which we sued under. And finding no due process violation, the Supreme Court reasoned as follows: And they say, Look, the reason it's constitutional is the defendants have a right to an immediate, an immediate, post-attachment hearing to either set

a bond or to have it dissolved. And so the First Circuit recognizes that the U.S. Supreme Court says that it is absolutely constitutional. Another – While federal courts are certainly not my favorite place, the Western District of Louisiana has likewise recently held that there's no due process violation in *John N. John, Jr., Inc. versus Brahma Petroleum Company,* where [p. 10] they have an analysis of the law, notice of due process, and they specifically state, citing again the *Grant* – the U.S. Supreme Court case in *Grant,* saying there is no violation. And they specifically state that there is no requirement nor need for any pre-attachment hearing. So, the federal courts, the state courts, and the U.S. Supreme Court, all say their arguments on due process are completely without merit. Now, it's also likewise – We do not contend, Your Honor, at this point in time that we have personal jurisdiction over these defendants. We don't contend that because we – We may ultimately get personal jurisdiction. But what we do contend that we have is quasi in rem jurisdiction. Article 9, Code of Civil Procedure, a Court which is otherwise competent of the laws of this state has jurisdiction to render a money judgment against a nonresident – they're nonresidents – not subject personally to the jurisdiction of the Court and – and we don't have that yet – only if the action is commenced by the attachment of his property in this state. That's what we did. We attached the defendant's property in this state – unless the nonresident subjects himself personally to the jurisdiction of the Court. The judgement would be executed only against the property attached. And that's what we're doing. [p. 11] We're only going to execute our judgment against the property, the Nevada, sitting in the River, unless we've

obtained personal jurisdiction. If we obtain personal jurisdiction, our judgment could exceed the value of the property sitting in the river. Now. We have faithfully followed the requirements of Article 3501 which gives us the basis for issuing a nonresident writ of attachment. They first say, Look, we didn't supply an affidavit from the plaintiff. Well, the plaintiff in this case has major brain damage. He is severely retarded. He does not even know his own name. That is why I verified the petition. Frankly, the Code of Civil Procedure 3501 covers that situation that says it should be the petition verified by or be a separate affidavit of petitioner, his counsel, that's me or his agent. And I have a power of attorney from the curator of this brain-damaged Mr. Eneria, which I'll file with my memorandum. So I – the petition was verified, contrary to their claims. Now they say, gee, you didn't say how much you wanted, and I – because 3501 says the nature of the claim and the amount thereof. They failed to point out it says the amount thereof, if any. 3542 says – Code of Civil Procedure 42 says, in making a claim with a nonresident attachment, it may be brought whether it is for a certain or an uncertain [p. 12] amount, whether it is liquidated or unliquidated. We have an unliquidated uncertain amount here for the damage estate of this individual. And most importantly, Your Honor, Code of Civil Procedure Article 893 that was effective since January '89 prohibits us from stating any specified amount in the petition in a petition for damages. Now so we verified and as far as specific facts, a brief review of petition will show that it could not be any more specific than what it is. We have alleged what happened, how the accident happened. We have alleged each and every element of

damage involved. We have given a detailed factual basis far more than is required. And since the basis of the issuance of this writ was the nonresidency, we have alleged in the petition that the defendants were not residents with no agents for service of process, a fact which they have now admitted in their brief. So the initial writ was entirely proper. Now finally they have brought up the claim in this to dissolve what I think to be maybe an exception of no cause of action saying, Look, Louisiana Supreme Court says the owner is not liable, in the *Backhus* case. A reading of *Backhus* says an owner, when there is a demise or bareboat charter, is not responsible for transitory unseaworthiness. Now, as Your Honor knows from your maritime experience, [p. 13] unseaworthiness is a species of liability without fault. It's when the ship is not – or its appurtenances is not fit for its intended purpose, such as a ship having a crane that doesn't work or something like that. Well, the Courts came along 35 years ago in the *Mitchell v. Trawler Lazer* (assumed spellings) case and created a doctrine of transitory unseaworthiness. Well, in *Mitchell*, there was fish gruel (assumed spelling) on the deck and a man slipped. And they said, well, it's just not seaworthy – right now. In *Backhus*, it was all the day. And the Supreme Court said, Look, for this transitory condition – this transitory – this temporary unseaworthiness, we are not going to hold the liable owner when they have given a long-term bareboat demise charter to a third party. What the law has always been, always been, that for unseaworthiness, as opposed to transitory unseaworthiness, the owner – not the charter – the owner is liable because there is something wrong with the ship. What's wrong with this ship is that the

crane fell and hit my client on the head and there was something wrong with the crane at the time they entered into the agreement. There are two recent decisions I'll call to Your Honor's attention. One is a Western District of Tennessee case. And as Your Honor knows, maritime law is uniform. [p. 14] Therefore we're compelled to follow the substantive maritime law that's uniform throughout the United States, and we followed all the procedural rules. And in *Late versus O-R-G-U-L-F Transport Company*, a 1994 decision, the port with a demise charter bareboat charter held the owner liable for the unseaworthy condition, as did the Fifth Circuit – Our Fifth Circuit in, Judge Reuben's opinion of *Baker v. Raymond International Inc.* So we have clearly stated the requisite, excuse me, cause of action in this particular case. Now, I don't know, according to the seaman's contract, they say, oh, maybe we ought to sue in federal. Well, they haven't brought that motion yet. But I do know that the shipping articles for the seaman's contract of employment and Malta subscribes to international labor organization. Conviction 22 that says there is awesome employment and there's no forum selection clause in that motion. Likewise, I know that forum non-convenience and forum selection clauses are procedural devices that our Louisiana Supreme Court in *Miller v. American Dredging* says, Look, we follow our state rules and our constitution says we're an open access forum and Article 123 says – Code of Civil procedure says we have to hear these cases and the United States Supreme Court affirmed that on February 23rd [p. 15] 1994. So their arguments they're making today or if they're making it subsequently are entirely without merit.

We have done a detailed petition, was verified by Counsel. That was properly served on the master. The vessel's under attachment. The Courts are uniform in holding state and federal that our nonresident attachment law is indeed constitutional and we have stated a cause of action under the general doctrine of unseaworthiness. So and, look, if we had insurance coverage, we wouldn't have bothered this Court. The hearing's – We normally work these out. They send me a letter of undertaking. It's a good idea to pay. We go through discovery and then in my 28 and a half years I've never had a trial with them. They always settle once the procedural foreplay is out of the way and that's what we're engaged in right now. Now, if we had insurance coverage, it would be a different situation. The – If the Court will give me the authority to file a memorandum, there are a couple of -- The distinction between personal and the quasi in rem jurisdiction was addressed by the U.S. Supreme Court in *Rounds v. Cloverport Foundry* that clearly says the purpose of prejudgment attachment is to gain the quasi in rem jurisdiction that is separate and distinct from personal jurisdiction. Just like our Article 9 says, [p. 16] You can do a prejudgment attachment when someone is not subject to the personal jurisdiction of the Court and that's what we've done. Now if Your Honor has any questions, I'll be happy to address them.

THE COURT: You care to respond?

MR. LAWTON: Your Honor, we're not arguing that the prejudgment attachment statue is unconstitutional as written. What we're saying that if it's to be applied in this case on the circumstances of this case and the way the petition is, it can't be applied, because Mr.

Dodson has failed to comply with requirements. Let's take a look at the requirements of the prejudgment attachment. They have to have a petition that sets forth specific facts and they have to be verified specific facts. Mere general allegations are not enough and I – and the specific facts –

THE COURT: Paragraph 13, that's not specific? Where they've got (a) through (h) with respect to how the direct and vicarious acts of negligence of the defendants and their agents –

MR. LAWTON: Well, there is –

THE COURT: – And there also under the general I [p. 17] think paragraph 14.

MR. LAWTON: Now, Your Honor, what they don't have any specific facts – Let's talk about two things. One, Mr. Dodson says that this was – Let's talk about jurisdiction and we'll talk about the facts of the accident In terms of the facts of the accident, he says this unseaworthy condition existed at the commencement of the bareboat charter. That's what he's urging now. Where is an affidavit of somebody that says that's true, of somebody who has knowledge about it. Information and belief. That may be fine just to file a lawsuit, but not to have a prejudgment attachment of vessel. Where is somebody who knows somebody in a position to know who says that at the start of this charter –

THE COURT: Is the defendant prepared to submit to the personal jurisdiction of the Court through its attorneys?

MR. LAWTON: No, Your Honor.

MR. LOZES: We can't.

MR. LAWTON: We can't do that.

THE COURT: And you have no insurance, and so you want to take your ship away?

[p. 18] MR. LAWTON: Well, let me say this. If he wants to have security and if he's entitled to security against the ship itself, he can go into federal court and assert an in rem lien. That's the proper place to assert a claim against a vessel, in federal court. But this is a claim against the defendant and against us, against Misano; and this particular case, he has not done what's necessary to have a prejudgment attachment. He has not shown by anybody who has any knowledge why we should be subject to personal jurisdiction. I understand there's a difference –

THE COURT: He's not asking for personal jurisdiction. He's looking for quasi in rem jurisdiction.

MR. LAWTON: But quasi in rem jurisdiction is subject to constitutional requirements just like the other, under *Shaffer v. Heitner,* Your Honor.

THE COURT: Yeah, I understand that. And I would prefer that St. Charles wasn't on both sides of this Mississippi River because we sure get enough of this – I can tell you that – with these ships coming in from all over. But the federal courts, including the Supreme Court of the United States, has [p. 19] said that we'll hear these cases.

MR. LAWTON: Well, I think if quasi in rem, he has to – the burden is on the plaintiff to come forward and show at this hearing today –This is the motion to

dissolve. Mr. Dodson says the reason it's constitutional is because we can get an immediate hearing. We asked for an immediate hearing. We called up on Thursday and they said the first date available was this morning. Fine. We filed our motion –

THE COURT: Well, that's pretty immediate; isn't it? That's pretty immediate?

MR. LAWTON: Okay. Well the burden is on Mr. Dodson to –

THE COURT: In fact, he didn't even get a memorandum until when?

MR. DODSON: 3:30 yesterday afternoon, Your Honor. And the only burden I have to show is that they are a nonresident with no appointed agent for service of process, a fact that they have admitted in their petition.

THE COURT: You know the Court is up to speed on where we are right now. It's just a question of just what is the appropriate ruling in this particular case. It [p. 20] certainly appears to me that, you know, to allow a ship a ship owner that may be liable under the general unseaworthy doctrine if it had an unseaworthy ship a crane that falls on the head of an individual seaman causing the type of injuries that are allegedly involved no insurance and then allow the ship to leave. I'm no prepared to do that right now. I realize that you've got a ship that it's loaded and you want it out. I think that each of you need to do what you need to do. Either you need your people maybe submit to the jurisdiction of this Court I think that the courts in the State of Louisiana can render justice just as well as the courts anywhere else, on

the facts of a case, on the trial of the merits. This would allow them to take their ship and go, is that correct, if they submit to the personal jurisdiction.

MR. DODSON: No, Your Honor, not entirely. Because there's still another purpose of the prejudgment attachment is to have a fund to execute against and the problem with not having that fund with a – what is alleged to be an insolvent ship owner, is that they would sail, we could get a judgment for so much money, and we would never be able to execute that judgment.

THE COURT: You have an insolvent ship owner that [p. 21] the ship is worth ten million dollars?

MR. LAWTON: Your Honor, the mortgage –

MR. LOZES: We have a mortgage, Your Honor.

MR. DODSON: The mortgage is slightly more than that.

THE COURT: Oh.

MR. LOZES: Your Honor, if I may interject for 30 seconds. The problem we have here is, obviously, is there's no insurance. Second, the vessel is going to lose the charter or the freights that are presently on board in connection with this voyage. Three, the present owners, we're talking about a situation where they demised this vessel to a third party for a year and a half before this man's accident. A year and a half. We're not talking about giving it today and Tuesday the crane fails. A wire that has to be periodically oiled apparently was not periodically oiled during the period of time –

THE COURT: Of course, this is for a trial on the merits. You know that.

MR. LOZES: Well, Your Honor, –

[p. 22] THE COURT: I don't know what made that crane fall, whether somebody took screws out of it or –

MR. LOZES: Yes. This entity is going to lose this ship. That's why we're not putting up a letter. We normally do but we reserve all of our defenses. We get the ship on the way. Mr. Dodson's good. But the reason we're asking a very close scrutiny of the due process, we're going to lose the ship because the vessel is mortgaged. The vessel is mortgaged. They can't put up a bond. They have no insurance. And we're ready to lose $450,000 of freight. When that cargo comes off – The cargo's contacted both of us. They're going to move to remove the cargo on Friday. The venture folds. And this entity, who has no contact with the State of Louisiana, has had no – The accident didn't occur here, nothing, nothing, nothing, nothing, is going to lose its property.

THE COURT: You know this no contact business is taken care of by somebody else, not me.

MR. LOZES: His solution is, Your Honor, properly – His solution is to perfect his lien. The vessel could be the offending thing, as we know. Perfect his lien in federal court. He could do that today.

[p. 23] THE COURT: Mr. Dodson would you answer that.

MR. DODSON: Well Your Honor I've already perfected my quasi in rem lien here and the plaintiff has

the choice of the forum, not the defendants. They want me to go to federal court so I may be kicked, abused, and thrown out by one of their friends on the federal bench. I don't like going to federal court and I'm not going to go to federal court. I'm just telling you the way it is.

THE COURT: Gee, and we've got one we're going to send up there?

MR. DODSON: I'm not going to go to federal court. What I am going to do, Your Honor, is I am going to hopefully obtain a judgment in this court. Then I am going to take it to federal court and lien their vessel anywhere in this world it may go and get this brain-damaged man some money. That's what my plan is. Because you know they know the rules just like I do.

MR. LOZES: He has a remedy in this jurisdiction. It's in federal court, to perfect his lien. That would be the appropriate.

THE COURT: Well, the problem is he may have a remedy in this Court also.

[p. 24] MR. LAWTON: He may. He may, Your Honor.

THE COURT: And, in fact, I mean the Fifth Circuit, they are quick to send all tax and federal matters down to the State courts. The Jones Act cases. We get more than they get.

MR. DODSON: Your Honor, that's what I'm saying. The suitor's clause says, the Saving to Suitor's Clause simply says, Plaintiff, there's concurrent jurisdiction in the federal and the state court, 28 U.S.C. 1333, says Saving to Suitor's a common-law remedy for 200 years

that has been interpreted to mean the plaintiff may choose does he want to go to federal court or does he want to go to state court. I have learned –

THE COURT: You have got until Thursday to submit your memorandum.

MR. DODSON: Thank you, Your Honor.

THE COURT: That's it under the rules and, you know.

MR. LOZES: May we concurrently be filing exceptions because we need to if we're going to get clobbered we need to tell this owner we're out.

[p. 25] MR. DODSON: They want to file their exceptions of forum non-convenience despite what the Supreme Court says. But they want to exhaust all their remedies and they're going to, I assume, want another hearing?

MR. LOZES: Forum selection clauses.

MR. DODSON: You want to do it on briefs or you want to ask the Court for a hearing?

MR. LAWTON: A hearing.

THE COURT: Friday morning?

MR. LAWTON: Friday morning.

MR. DODSON: What time, Your Honor? Court's pleasure.

THE COURT: 9:00.

MR. DODSON: Yes, Your Honor.

MR. LAWTON: Your Honor, he's to have his memorandum by Thursday and I take it there's no other evidence.

MR. DODSON: Well, I'm going to attach some affidavits to mine.

[p. 26] MR. LAWTON: Well, I – Let me object to that because this is – I mean, today is the time for the evidence.

THE COURT: Well, under the rules you should have submitted your memorandum –

MR. DODSON: They gave me their affidavits when the Court opened while we were waiting on Your Honor and I had – I mean, I had no idea what they were going to say to you. I had to get mine from overseas.

THE COURT: Thursday evening by 3:00.

MR. DODSON: Yes, Your Honor. It'll be here and we'll see you. And then, Your Honor, I will then respond – When are you going to give me your exceptions memorandum on Form 9 so I can respond to that?

THE COURT: Tomorrow.

MR. LOZES: Tomorrow.

MR. DODSON: And you'll have your memo tomorrow too.

MR. LOZES: As soon as we can yeah.

MR. DODSON: Then I'll respond to that by – within 24 hours of getting it I will respond.

[p. 27] THE COURT: All right, gentlemen.

MR. DODSON: Thank you.

* * *

[p. 28] CERTIFICATE

I, MELANIE ROBERT CALLENDER, CCR, RPR, Official Reporter, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings held in the matter of CORAZON ENERIA, ET AL VERSUS SPEI LEASING SPA AND MISANO DI NAVIGAZIONE SPA, NUMBER 43,870, DIVISION "E", to the best of my ability and understanding.

/s/ Melanie Robert Callender
MELANIE ROBERT CALLENDER,
CCR, RPR

TWENTY-NINTH JUDICIAL DISTRICT COURT

PARISH OF ST. CHARLES

STATE OF LOUISIANA

CORAZON G. ENERIA, INDIVIDUALLY, AND AS GUARDIAN OF ELISEO E. ENERIA, AND AS TUTRIX OF ELCY ENERIA, LOUIE ENERIA, AND CAROL ENERIA

NUMBER: 43,870

VERSUS

SPEI LEASING SPA AND MISANO DI NAVIGAZIONE SPA

DIVISION: "E"

THE HONORABLE JOEL T. CHAISSON

JUDGE

Transcript of Proceedings

Taken in Open Court at Hahnville, Louisiana, on

January 27, 1995

HEARING ON MOTIONS

APPEARANCES:

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Official Court Reporter
29th Judicial District Court

[p. 2] **(PROCEEDINGS)**

THE COURT: Morning, gentlemen.

MR. DODSON: Morning, Your Honor.

MR. LAWTON: Morning, Your Honor.

THE COURT: I thought some of you might be delayed by the rain. 43,870, Corazon Eneria versus SPEI Leasing SPA, et al, 43,870. Let's please make an appearance for the record, gentlemen.

MR. LAWTON: David Lawton and Charles Lozes for Misano Navigazione.

MR. DODSON: And SPEI Leasing?

MR. LAWTON: No. Misano.

MR. DODSON: Richard Dodson and Bill Roberts, for the plaintiff and respondents in motion. Do you want to go first?

MR. LAWTON: I have additional evidence, if Mr. Dodson has put on all his evidence. I don't know if he's finished his evidence.

MR. DODSON: I have a supplement to the writ of attachment. We left off Exhibit C, Your Honor, and I'd like to file that in the [p. 3] record.

THE COURT: What is Exhibit C?

MR. DODSON: A list of voyages. The Nevada is calling on some 29 ports. We thought it was interesting, considering the defendants were saying they had no contact with this country.

THE COURT: All right.

MR. LAWTON: That's the extent of it?

MR. DODSON: In addition to what I filed in my memorandum. I'd like to offer, introduce, and file the exhibits that were attached to our memorandum, Your Honor, namely the medical records pertaining to Mr. Eneria and the extract from the deck log book of March 3rd, 1993, from the Nevada, showing how the accident happened.

THE COURT: All right.

MR. LAWTON: We have no objection to those, Your Honor.

THE COURT: All right. Proceed.

MR. LAWTON: Your Honor, on behalf of defendant, Misano, we have 14 exhibits that we'd like [p. 4] to offer to the Court. And, Your Honor, one of these we sent forward to you so you could see ahead of time, which was the affidavit of Mr. Corvetta. But if I could, I'll speak very briefly as to why we're putting in these exhibits, without great detail, so you know the reasons for these exhibits being placed in. Mr. Corvetta's affidavit, as president of Misano as you're aware, and he testifies that there is no activity being undertaken by Misano in the State of Louisiana. His affidavit also speaks to the fact of the bareboat charter which was entered into by Misano to Ash Limited in April of 19 – or excuse me – May of 1991,

approximately two years before this accident, and that they had no employees on the ship, no operation, management, control and so forth. Exhibit Number 2 is the bareboat charter that is referred to by – in the affidavit by Mr. Corvetta. And we've also attached a – the form. It's on a BEARCON 89 form, a standard form of bareboat charter. And we, because it's difficult to read, –

THE COURT: You didn't mark these, did you? They just –

MR. LAWTON: I'm afraid you're right, Your Honor. I did not.

[p. 5] THE COURT: Which is fine, I guess, if you can make your notes what they are. Okay. Proceed.

MR. LAWTON: All right. And we've attached to it, to make it easier, a copy of the standard form which. is blown up in more readable English from a BEARCON 89 form. So any references can be made to that as well. Exhibit Number 3 are certain riders to the bareboat charter, just for the sake of completeness, that were referred to in the affidavit and were part of it. Exhibit Number 4 is the bareboat charter entered into between Misano and Sea Panther. And just to tell Your Honor, to kind of explain the stage here, Misano bareboat chartered this vessel in May 1991 to Ash. Ash was operating this vessel, controlled it in every way from 1991 up until February of 1994.

THE COURT: And who is Ash?

MR. LAWTON: Ash is the bareboat charterer. And they effectively –

THE COURT: But who are they are?

MR. LAWTON: Well, they're a company that's now in litigation, I guess over in Europe, as to – for failure, because they quit making the [p. 6] payments, and the vessel had to be taken back.

THE COURT: And where is Ash? Where are they from?

MR. LAWTON: They're – I think they may be Maltese. I'm not sure what it says as to their – It may say on the charter there where they are. I'm not familiar with the particulars of Ash, Your Honor.

MR. DODSON: Malta shell corporation, Your Honor.

MR. LAWTON: I just don't know. I do know it's independent Misano because they're still fighting guarantors trying to get money that's owed to them as a result of this charter. I can't say that they're – They're not the same company because they're in the midst of trying to continue to make recoveries as of the result of the losses they've sustained.

THE COURT: So they all use the English language. All right. All right. Proceed.

MR. LAWTON: The – So from basically from 1991, May of 1991 to February of 1994, this vessel was in the complete control and all employees were employed on it by Ash. Because they weren't making payments, the vessel was [p. 7] taken back. This charter to Ash really was for 10, 11 years plus options to buy. So essentially Misano thought they were out of it. When they took it back, they then bareboat chartered it in 1994 to another company. That company's name is Sea Panther, which is a

Maltese company. And we've put in as Exhibit Number 4 the bareboat charter to Sea Panther. So, and that's in effect at the present time, Your Honor. So, effectively, Misano does not have any control and has not since May of 1991 over the operations of this vessel, repair, maintenance, employment of any crew or where it goes. And the effect of that, as Mr. Dodson puts in the affidavit, says the ship comes here. Misano has nothing to do with where the ship goes. Anywhere in the world. Has absolutely nothing to do with it. Has absolutely no control whatsoever. Has no right to exercise any control as to where it goes. Number 5 is an exhibit showing the protocol of delivery to the Sea Panther and then Sea Panther apparently subchartered to Med Tank. And for purposes of just completeness of the record we put in a telex regarding that delivery. Sea Panther, now being the disponet owner of the actual bareboat charter of the vessel and having control of it, are registered in Malta with the authorities as the owner, as the bareboat [p. 8] chartered owner. And that – We put in the provisional certificate of registry, which is effective through today, into February of 1995 I see. So if you go to see who is in charge of this vessel right now, the answer is Sea Panther has a right to – subject to any subcharters they may have put in. Exhibit Number 8 are classification surveys. This vessel, like most vessels that sail around the world, large vessels, it's required that it be kept in regular inspections by classification survey – surveyors. Because the ship was – had some – was originally Italian, it's an Italian classification society. You'll see that we put in the surveys that were performed in 1992, a year before this accident, by the surveyors, and which they found the ship to be in class.

And the significance of that is that Mr. Dodson has alleged that the vessel, when turned over in May 1991, was unseaworthy, that the crane was defective. The only – The very deck log he put in said the wire is what broke, to which we don't deny that. But the fact is that there were inspections made and there is no evidence put forward by Mr. Dodson that the time this was turned over, in 1991, that there was a defective condition. And just to mention one other thing in connection with that, the last exhibit – I don't mean to jump forward, Mr. Haveman's [p. 9] affidavit, who is a – who has been a surveyor for classification societies and now has a separate consulting company – And he speaks to the time of deterioration it takes for cable, steel wire, in an ocean environment. And if you don't properly maintain it, it can deteriorate in three to six months. So the fact that two years later wire may have been deteriorated really doesn't prove anything. The question is, is there any proof by Mr. Dodson that at the time this was turned over that the vessel was defective. And the burden of proof, of course, is on the plaintiff at this stage in proceeding because he's attached property in this. Exhibit Number 9 are other suits filed by Mr. Dodson for Filipino seamen which he has the same allegations, particularized allegations of unseaworthiness that he made in this case, just to show there aren't really any particularized allegations. Exhibit 10 is the collective bargaining agreement that applies to this vessel. Exhibit 11 are articles signed by the seaman. Mr. Dodson asked those be produced. We have produced those. They show the owner, under the articles, as Ash Limited. So the seaman's contract of employment – and there's really two of those, Your Honor. One is kind

of a large exhibit, the articles of the seaman there. That may be –

[p. 10] THE COURT: Is this the standard employment contract?

MR. LAWTON: No. That's the Philippine –

THE COURT: The Philippine Overseas Employment?

MR. LAWTON: No. That's a different one. Then there's right behind it maybe. That's the one, I think. Is that –

THE COURT: Instructions to masters?

MR. LAWTON: Look on the back of that. Do we have –

THE COURT: Maltese ships agreement and list of the crew.

MR. LAWTON: There we go. And that's the articles. You'll see that lists as the owner, the man who – Ash Limited.

THE COURT: All right.

MR. LAWTON: So that's his articles of – that he signed with the ship, according to Maltese law. The contract of employment he signed in the Philippines does – shows another company. None of those companies are Misano because Misano never employed this man. Never employed the man at any respect [p. 11] whatsoever. Did not – Didn't have any reason to because it didn't employ anybody on the ship. All right. Exhibits Number 12 and 13, is that employment contract and the revised standard

– or the standard contract which any Filipino seaman has to sign on that POEA form. And it incorporates the collective bargaining agreement that revised – that standard collective bargaining agreement which says you have to bring any claims arising out of the employer relationship in the Philippines before the POEA. That's Philippine law. That's purely and simply Philippine law. The man has no choice. The Philippines decide we're going to regulate our seaman that go overseas and they have to bring their claims here before the POEA. And finally, Your Honor, is the affidavit of Mr. Haveman, as I stated before, which respects to the inspection of the vessel. So those are the exhibits that we offer into evidence. And if you'd like us to argue, Mr. Dodson may argue first or if you want me to – to put forward my argument in this case, I'll be glad to proceed.

MR. DODSON: Well, Your Honor, I don't – We got a copy of it this morning and I just briefly – Mr. Lawton said this collective bargaining agreement was applied and it's one that was applicable to this case. Well, it's dated [p. 12] on its face 1989 and ends in 1990. This accident happened in March of '93. So I mean, I highly question – I mean, I don't have any objection to it coming into evidence. I just don't think it's applicable. He says the shipping articles show that Ash Limited is the owner. Well, that's, you know, he's admitted that the owner is SPEI Leasing and that the desponet owner they bareboat chartered it to is Misano. So while I don't object, I question the relevancy as to this proceeding.

THE COURT: All right. Your arguments are noted. And it makes no difference to me who argues first.

MR. LAWTON: All right.

MR. DODSON: Your motions.

MR. LAWTON: Well, okay. I'll be glad to argue first.

THE COURT: And I've read the memorandums, gentlemen. It wasn't the rain that held me up.

MR. LAWTON: Okay. Your Honor, with respect to the attachment, we're here. And we're here, before on Tuesday and today, because the plaintiff has to come forward and show his [p. 13] evidence to prove, by the very wording of the statute, to prove that he's entitled to the attachment. He has to prove that he's entitled to this. He has to prove the facts sufficient to show that he be entitled to recovery, to some amount. He has to show facts sufficient to show jurisdiction and the attachment. Otherwise, it should be dissolved. This burden is clearly on the plaintiff. Let's look what Mr. Dodson has produced in connection with that. He's listed that at the end of his memorandum. He has produced admissions by the defendants that they're nonresidents. We don't dispute that. He's produced admissions that there's no duly appointed agent. That's not denied. He's produced medical records. There's no dispute about those. He's produced a copy of the deck log that says the line parted. And he's produced records showing the vessel has come into U.S. ports at times. Those are the only facts that he has come forward with to try to show that Misano should somehow be held liable for this accident, this vessel should be attached for some debt alleged to be of Misano. That is not carrying what – the burden that is on him. He has not shown that – has not shown any evidence at the time this vessel was

turned over in its bareboat charter, two years before this accident, that there was unseaworthy [p. 14] condition. Not a bit of evidence has been shown as to that. He has not – And we've put – To the contrary, we've put evidence showing there was inspections. So there's absolutely no evidence to show that. He has not shown that there is any employment relationship. That's what's alleged in his complaint, that these were the employers and operators. That's what he says in his verified complaint, employers and operators to the seaman. Clearly, he's not – Misano is not the employer of this man. Clearly, he's not. There's no employment relationship with him at all and they're not the operator of the vessel. We put in the uncontradicted evidence. They did not operate the vessel during that period of time. Did not employ anybody on it. So he hasn't proved that. So he has not proved negligence, and he hasn't proved unseaworthiness, and he hasn't proved any existence under any other law to show that he's entitled to recovery. These are obligations on him. So in terms of the facts of the accident, he has not come forward to show that he's entitled to a pre-judgment attachment of our property, which is what has occurred in this case and which we're seeking dissolution. So that's item number one. He has failed completely in that aspect and, in fact, the evidence we put in have shown exactly to the contrary. [p. 15] Number two is, What property is he attaching right now? This vessel is not under the control of Misano. Misano has bareboat chartered this vessel, as of February 1994, and still the present time, to Sea Panther Navigation. And Misano, just like it hasn't had since before 1991, has no operational control over this vessel.

THE COURT: Does Sea Panther have insurance?

MR. LAWTON: Does Sea Panther have insurance? For this accident?

THE COURT: No, I didn't say that. Does Sea Panther have insurance? That's the first thing I would check if I were owner of the vessel. That's just a comment.

MR. LAWTON: Yeah. I would assume they would, Your Honor, but I also assume that doesn't cover prior accidents on –

THE COURT: Oh, I understand that, too.

MR. LAWTON: All right. Okay. The next – So what is he trying to attach now? He's trying to assert jurisdiction over a company, simply because a vessel has come into Louisiana, not at the direction of Misano. Misano has never directed this vessel, at least before 1991, I can't say about then, into the State [p. 16] of Louisiana. Misano has never employed or had any relationship with Louisiana.

THE COURT: Did they direct it not to come into this waters as a result of its bareboat charter to someone else?

MR. LAWTON: No.

THE COURT: In other words, it was free to travel, I assume, anywhere that –

MR. LAWTON: Anywhere the bareboat charterer wanted to bring it.

THE COURT: All right.

MR. LAWTON: With the exception of maybe some –

THE COURT: Okay. I'm not concerned about those arguments. I'm much more concerned about the general principles of law, admiralty law, recognized I guess forever, the unseaworthiness of the vessel and inability of a ship owner to alleviate themself of that particular burden, in my estimation, which would directly make this bareboat charter responsible for everything. Because I've read the memorandums, Counsel, and it's obviously clear to me that under Louisiana law we have a quasi in rem jurisdiction where you can attach vessels and obtain [p. 17] jurisdiction over the vessel. I don't mean to interrupt your argument, but there are certain things that – I realize this boat was bareboat chartered to someone else. And, unfortunately, they didn't have insurance. The accident happened while it was under their control. But did the vessel owner have the right to delegate the duty –

MR. LAWTON: Well, the *Backhus* case that we cited, Your Honor, speaks directly to that point. And it says – and Mr. Dodson has cited *Baker v. Raymond* in the Fifth Circuit case in Federal Courts. But that case was considered by *Backhus*. And they said and the *Backhus* Court said, We understand what the Federal Circuit does here, but the majority of circuits have ruled otherwise. And the ruling of Louisiana was, as far as they're concerned, Louisiana Supreme Court, that the – a vessel that's bareboat chartered, where the complete operation and management is transferred to someone else, as in this

case, does not maintain – does not continue to owe an obligation for seaworthiness.

THE COURT: Is that really the law?

MR. LAWTON: Yes, Your Honor.

MR. LOZES: Yes, sir.

[p. 18] THE COURT: Could I bareboat charter my vessel to anyone, not be concerned whether or not they inspect the vessel, whether they maintain the vessel, whether they insure the vessel, or whether they operate legitimate cargo on the vessel?

MR. LAWTON: Yes, Your Honor. I think the law is – In other words, you may have an installment sale or something, too, where you say, I don't have any involvement.

THE COURT: Oh, well, an installment sale might be different. A sale is a sale. You divest yourself of ownership.

MR. LAWTON: Well, this – A bareboat charter is a divesting of all ownership ability for that period and, in fact, essentially, this was a 10 or 11 year – I don't recall exactly – but it's a long-term charter with purchase options at the end by Ash. They were divesting themselves. And if Ash had continued to maintain its payments, Ash would own this at the end of the charter. Because usually in those things, at the end you make the payment and that's it, you get the ship. So as a practical matter, yes, what they did was divest – Misano divested themselves entirely, except to retain the ability to get the vessel back if payments [p. 19] were not made. Otherwise, they had no involvement whatsoever.

THE COURT: Could they get the vessel back if there were other conditions that – Did the bareboat charter require that they insure the vessel?

MR. LAWTON: There was a requirement of insurance in there I believe, Your Honor. Yes.

THE COURT: All right. Go on.

MR. LAWTON: All right. There's also a question in this as to due process in the attachment. And that is this, you have to look – The Court has to look at the involvement of each defendant itself and the attachment. The mere presence of a thing is not enough, under the Supreme Court standards, to allow quasi in rem attachment. It has to be something more than that. Misano does not have any relationship with the State of Louisiana. It simply doesn't. They're being hailed into Court in a totally fortuitous manner, which is totally out of their control, by this attachment. And they have no relationship to Louisiana. So it's a violation of due process. And *Shaffer v. Heitner* said just because property is in there does not mean that its – it comports with notions of due process. That was the [p. 20] old rule, before *Shaffer v. Heitner*, but it's not anymore. And the Court has to undertake that analysis of due process and minimum contacts. And there are not minimum contacts. This is not an action which they're seeking to have title determined. This is not an in rem action. He can go down to Federal Court, which is the proper jurisdiction. If he wants to say, I have a claim against the vessel itself, Federal Court is where he makes a claim against the vessel. That's where he can go. He can go right down the street and do that, but –

THE COURT: I wish that were a true statement. I don't know why they all keep coming into state court.

MR. LAWTON: Well, that's Mr. Dodson's choice, I guess.

MR. LOZES: Forum non conveniens. That's the answer.

MR. LAWTON: Well, the answer is probably that these cases, you know, should not be in the United States. They should be in the jurisdictions where there's some relevance to litigation. And that's one of the things the Court needs to look at in terms of due process as well. And that's specifically pointed out in some of the Supreme Court cases that where – [p. 21] What's the connections with the litigation? Where should it be? Does it make any sense to have it where it is? That's part of the notion of fair play. This litigation should be in Italy, Malta, or the Philippines. There's no reason for it to be in Louisiana, whatsoever. Absolutely not.

THE COURT: Well, according to the Philippines, it has to be in the Philippines.

MR. LAWTON: According to the Philippines, it has to be in the Philippines.

THE COURT: Okay.

MR. LAWTON: That's correct. So if you look at it in terms of notions of due process, minimum contacts, there are not minimum contacts. The only contact is that Misano has a chain in the title, a chain in the title to this vessel. Finally, Your Honor, there's a question which goes into the notions of due process, is the type of damage. The delay of this vessel has already caused damages in

excess of one hundred thousand dollars and it's mounting. If the cargo is not delivered within a very short window of time at its destination, it's going to suffer damages in excess of one hundred thousand dollars a day for a period of time. If there's tram-shipment (assumed spelling), [p. 22] we're talking about five hundred thousand dollars in damages, so – And what's the remedy of this defendant? What's the remedy of the parties involved here? We have an impecunious plaintiff. So right now, after a week of this, they've had money taken from them without a showing whatsoever by plaintiff that they're likely to be entitled to recovery.

THE COURT: Let me ask you, did they have this vessel loaded after it was attached –

MR. LAWTON: Misano didn't. And that's a good question, Your Honor. Misano has no choice. They have no involvement. They cannot order the vessel anywhere. They cannot order – They don't have any right to load or discharge. That's someone else. And that would have been the – Sea Panther actually voyage chartered to a third party, Med Tank, and Med Tank has a right to do what they want to with –

THE COURT: You mean, there's somebody else?

MR. LAWTON: There's somebody else. That's right. And we have some attorneys here for some of the other parties down the line so, you know, and then they're concerned because they're standing to lose money as well. But this is something. And it brings in another [p. 23] point, which is the commerce clause involvement. We have a ship in international commerce, you have

parties from around the world, and this is being held up by somebody who is just a link in the title, a claim against them. And as a practical matter, various people are suffering substantial amounts of damage when there's been no affirmative showing by the plaintiff he's entitled to recovery, and there's no reason this – this case should be in this Court. And there's no remedy of any of these parties to get back from the plaintiff. He's impecunious. No remedy whatsoever. So this – If there's ever a taking, if there's ever a taking, this is a real taking, and there's a real taking without any showing, pre-judgment taking, Your Honor, from all these parties.

THE COURT: Well, and I don't want to pre-judge the case, but I do believe this claimant, be he a Filipino who's now mentally retarded as a result of a crane falling on his head, has suffered and lost, also. Now, I don't know who he's entitled to recover against, because that would be pre-judging the case, but it's difficult for me to envision a set of facts where if the crane falls on your head that you're responsible for the accident, unless he was operating it. I don't know. Go on.

[p. 24] MR. LAWTON: Well, Your Honor, I think I've covered most of the aspects of this. You know, we don't think there's been a showing made as to these various aspects. The burden of proof is on the plaintiff to make these showings, both to jurisdiction and as to a prima facia case. And there's proper remedies in Federal Court in rem where he can go. And if he wants to get protected, let him go and file his claim in rem against the vessel in Federal Court.

MR. DODSON: If it please the Court, Your Honor's right; there was a taking. There was a taking of Mr. Eneria's life, when their unseaworthy vessel dropped a crane on his head where he was standing on the deck. That was the only taking. I'm sorry that SPEI Leasing, the registered owner of this vessel, made a bad deal by doing a bareboat charter to Misano. I'm even sorrier that Misano made a terrible deal by doing a bareboat charter to Ash Limited, a Malta company that was supposed to maintain insurance, that was supposed to keep the vessel seaworthy and do all these things. The fact that Ash Limited didn't do its job, they didn't pay the insurance premium, Misano, as the first bareboat charter or whatever, obviously didn't do their job. They took it back. SPEI Leasing, who is the [p. 25] registered owner and is the one that is responsible for the seaworthiness of the vessel, was obviously sitting in their corporate tower somewhere in the world not doing their job. But those are their problems. The maritime law clearly gives us the appropriate remedy. And I have a couple of additional cases, Your Honor, just simply one I – I'll cite from a *Trans Asiatic Oil v. Apex Oil,* 743 Fed. 2d., 956, at 960, To disapprove maritime attachments on constitutional grounds, so as to require the plaintiffs sue corporate entities only in their home districts would expose plaintiffs, who might often be seaman or suppliers to some distant port, to the variegnies (assumed spelling) of intricate corporate shells employed to disguise the ownership of shipping assets. Now that's what we got here, you know, from Ash to Sea Panther to Misano to, you know, SPEI Leasing, that has not raised its head. This case further says that the traditional notions of fair play in the

maritime field are not offended by attaching the property of a ship owner at a distant port because shipping is a transitory business. And that is the whole idea. There are numerous cases. Another, 923 Fed. 2d. 380, specifically approving of this to obtain quasi in rem jurisdiction, not requiring the defendant to be sued at home but [p. 26] wherever he might be found, anywhere in this world. Now, I differ with my good friend, Mr. Lawton, on what we need to show. We need – The code is quite specific. All we need to show is that the defendant is a nonresident and that the defendant has no agent for service of process and that we have made the specific allegations –

THE COURT: Is that stipulated by both parties?

MR. DODSON: Yes, Your Honor.

MR. LAWTON: (Nods head.)

THE COURT: All right.

MR. DODSON: And that we have specified the nature of the claim. There is no requirement nor reported case that we must make a prima facia showing of our case at this point in time. However, we have even done that by putting on the deck log indicating that the crane broke and fell on the man's head. The *Backhus* case that Mr. Lawton relies upon is where there was some oil and water on the deck of a vessel. And the Supreme Court, Louisiana, says this is transitory unseaworthiness. You can mop it up, it will be gone, and the vessel is fine. This vessel, the Nevada, was never fine and would never be fine. It had a defective crane. [p. 27] And the crane fell. Now, Mr. Gelpi, who's out here, we have a case with his firm right now where the crane fell, this was in St. James

Parish, and killed two Filipinos. They hadn't change the crane wire in 17 years. Now, they're not –

MR. GELPI: We don't agree to that.

MR. DODSON: Oh, I understand that. I understand he doesn't agree to that. But I – we settle with one thing, we doing good. But bottom line is –

THE COURT: Well, who named this vessel the Nevada?

MR. DODSON: Well, we contend that's when they recapitalized or they –

MR. LOZES: Sea Panther.

THE COURT: Sea Panther?

MR. LOZES: Sea Panther, February of '94.

MR. DODSON: And the Nebraska.

MR. LOZES: No, Sea Panther.

MR. DODSON: Glad to hear that. But, we – We take issue with that but, you know, I'm glad to [p. 28] hear that Sea Panther has done that. So we have maintained that we have met our burden of proof, you know, entirely. We've done all that's required. We're sorry that they don't have any insurance, because in every other case they put up a bond and then the ship sails. The venue is proper. The Code says venue is where the property is attached. We've met all of the constitutional tests. The vessel, this vessel, has been here 29 times. And the fact that one of their agents comes here is of no moment. The fact is this ship owner's property has been and is within the jurisdiction of our court. And the ship itself, –

the ship owner is the one that has the absolute nondilatable duty to provide the unseaworthy vessel – to provide the seaworthy vessel. And the fact that they were negligent in not doing that is not this poor brain-damaged individual's fault. Now, one final thing, while a forum selection clause is nothing more than a forum non conveniens. It's not allowed in Louisiana. I do want to call to the Court's attention two cases, *Randall v. Arabian American Oil*, 778 Fed. 2d. 1146, and *Curtis v. Hay-Winstone Company*, 653 Fed. 2d. Both deal with these foreign countries passing laws giving them exclusive jurisdiction. Here is what the Fifth Circuit says about that. The geopolitical outreach of a [p. 29] foreign country's legislative jurisdiction normally does not extend beyond its boarders, and the effect of a foreign sovereign's laws in another country depends on the recognition the other countries chooses to give it. So, – reciprocity or the formal agreement. We reject outright the notion that the law of a foreign country can unilaterally curtail the power of our courts to hear a dispute, even though the disputed laws rights are fixed by the law in another nation.

THE COURT: What case is that?

MR. DODSON: That, Your Honor, is the *Randall v. Arabian American Oil Company*, where they were saying, well, Saudi Arabian law says you've got to sue –

THE COURT: Which Court?

MR. DODSON: Fifth Circuit. Federal Fifth Circuit, Your Honor. You've got to sue in Saudi Arabia. And he can't do that. Saudi Arabia can't oust our courts. The Philippines can't oust our courts.

THE COURT: That's what Adrian Duplantier said. Is that his decision?

MR. DODSON: Well, no, sir, that's not his [p. 30] decision.

THE COURT: Okay.

MR. DODSON: So there is no moment to that whatsoever. If Your Honor has any specific concerns, I'll be happy to address them. I know you've read the briefs. I don't want to burden the Court.

THE COURT: I have read the briefs and, you know, I'm certain that no one at least will be satisfied exactly what this Court does. This defendant is not prepared to submit to the personal jurisdiction of this Court?

MR. LAWTON: No, Your Honor.

THE COURT: All right.

MR. LOZES: We can't.

THE COURT: The Court finds that it in fact does have – that venue is proper, that the Court has jurisdiction over the vessel that has been properly seized. The Court finds that the other exceptions that have been brought have no merit, that forum non conveniens or selection of – or whatever the other word for it – I forget what it is – that those are procedural rules in federal court, not for state courts to apply; that we're bound [p. 31] by the Code of Civil Procedure, Article 123:44. Accordingly, any petition to dissolve the attachment is denied. This Court has venue and jurisdiction.

MR. DODSON: Thank you, Your Honor.

THE COURT: Do you care, Counsel, for time to go ahead and take your writs?

MR. LAWTON: Yes, Your Honor.

THE COURT: All right.

MR. LAWTON: And I've got –

THE COURT: And, you know, the Court has read the memorandums of all parties. Y'all have done magnificent jobs. The Court will adopt as its written reasons Mr. Dodson's finely done memorandum.

MR. DODSON: Your Honor, if I might, I would like to submit a proposed judgment so if he does take writs it would be – we would have a judgment to do so.

MR. LOZES: We have one also.

THE COURT: Do you?

MR. LOZES: Because we are – Yes, Your Honor. [p. 32] We got the form for the writs.

THE COURT: Do they read the same?

MR. LOZES: I doubt it very seriously.

MR. DODSON: Mine, Your Honor, – Your Honor, if we had one, I would file mine. Because in the first place, mine tracks my memorandum as far as the basis and the last page being the ruling. So mine might be a more comprehensive approach to the writ.

MR. LAWTON: Let's see if we give you the right one –

THE COURT: I'll sign both.

MR. LAWTON: – denying it.

THE COURT: It's an order denying. It's a judgment in accordance with my ruling. I have considered all of this. Let's see. Today is the 27th, right?

MR. DODSON: Yes, Your Honor.

THE COURT: You've given him a copy of your notice of intention to apply for writs?

MR. DODSON: Yes, Your Honor.

[p. 33] MR. LAWTON: We probably have two separate ones. We'll give you one, Your Honor, for exceptions and one for the dissolution of attachment.

THE COURT: I just have an order denying motion to dissolve attachment. I don't have the order denying –

MR. DODSON: The judgment we submitted, Your Honor, does contain both of them.

THE COURT: It does contain it. But if they want, you know, –

MR. LAWTON: Well, here's our – I'll sign this.

THE COURT: Let me look at it. Fourteen days from today is when?

MR. DODSON: Well, there's four days left, 31 days in this month, so it will be February 10th, Your Honor. Fourteen days from today.

THE COURT: You all agree with that, Counsel? February 10th.

MR. LOZES: (Nods head.)

MR. DODSON: It would be a Friday.

[p. 34] MR. LAWTON: This is for the exceptions. The other one is in –

THE COURT: Yes. Well, –

THE COURT: Lack of personal jurisdiction – I don't recall any argument with respect to that. I'm not saying I have personal jurisdiction in this case. I'm saying that I have jurisdiction in rem.

MR. DODSON: You have quasi in rem, Your Honor.

THE COURT: Yeah, quasi in rem.

MR. DODSON: Yeah. That's what we have.

THE COURT: So, –

MR. LAWTON: That was one of the exceptions we brought before the Court, Your Honor.

THE COURT: Well, –

MR. DODSON: Well, you have made it – They have made a general appearance by violating Article 7. But we're just saying it's a general principle. We're not pushing the personal jurisdiction matter at this point because you made an appearance by filing documents not authorized in Article 7. [p. 35] We're just simply saying the exception's overruled.

MR. LAWTON: No. We have not made any personal appearance. We have only come in to move to dissolve the attachment and file the dilatory exception. There has not been personal appearance.

MR. DODSON: Well, what about your motion for forum non conveniens? It's not an exception, so said the appellate courts.

MR. LAWTON: It is an exception, Mr. Dodson.

MR. DODSON: Well, we can argue that in the Fifth Circuit. I think the law, you know, is quite clear.

MR. LAWTON: Well, Your Honor, then we'll be glad to submit a separate judgment saying that –

THE COURT: I'll sign them all.

MR. DODSON: You can tell, Your Honor, we do this quite frequently together.

THE COURT: Yeah . . . You act like y'all know each other.

MR. DODSON: Well, they have the writ on their computer. You know, they're using form 23B [p. 36] for this particular case. But it's –

THE COURT: All right. And here are all the memorandums.

MR. DODSON: Thank you, Your Honor.

THE COURT: Counsel, would you help the clerk by marking your exhibits?

MR. LAWTON: Yes.

THE COURT: It would assist, rather than her having to go through that and number them 1 through 14 as I recall.

MR. LAWTON: Right. Thank you very much.

THE COURT: Thank you.

MR. DODSON: Thank you, Your Honor. (Break in the proceedings.)

THE COURT: All right.

MR. LAWTON: Your Honor, I'm the one who prompted – Really, I just had a chance to read the judgment that was given to you by Mr. Dodson to sign in this case. And there's a lot of things in there that I didn't think was part of the judgment that was being rendered. And a number of things are in there that I'd

* * *

EXHIBIT 7

PORT NAME	COUNTRY	ARRIVED	SAILED/ STATUS
New Orleans, La	(USA)	13 Jan 95	Arrival
Wilmington, NC	(USA)	09 Jan 95	10 Jan 95
New York, NY	(USA)	05 Jan 95	07 Jan 95
New Orleans, La	(USA)	05 Aug 94	11 Aug 94
Coatzacoalcos	(MEX)	26 Jun 94	29 Jun 94
New York, NY	(USA)	17 Jun 94	19 Jun 94
South Riding Point	(BAH)	13 Jun 94	13 Jun 94
Philadelphia, Pa	(USA)	01 Jun 94	04 Jun 94
New York, NY	(USA)	29 May 94	01 Jun 94
Aruba	(ARU)	–	–
Puerto la Cruz	(VEN)	20 May 94	22 May 94
New York, NY	(USA)	08 May 94	12 May 94
Tees	(GBI)	22 Apr 94	25 Apr 94
Europoort	(NTH)	20 Apr 94	21 Apr 94
Pointe-a-Pierre	(TRI)	03 Apr 94	05 Apr 94
Portland, Me	(USA)	23 Mar 94	25 Mar 94
Searsport, Me	(USA)	–	–
Boston, Ma	(USA)	19 Mar 94	20 Mar 94
Freeport (Bahamas)	(BAH)	11 Mar 94	–
Port Esquivel	(JAM)	27 Feb 94	–
New Orleans, La	(USA)	20 Feb 94	24 Feb 94
Corpus Christi, TX	(USA)	01 Feb 94	04 Feb 94
New Orleans, La	(USA)	12 Nov 93	19 Nov 93
Houston, Tx	(USA)	08 Nov 93	10 Nov 93
Houston, Tx	(USA)	24 Jun 93	25 Jun 93
Corpus Christi, Tx	(USA)	21 Jun 93	23 Jun 93
New Orleans, La	(USA)	30 Mar 93	05 Apr 93
New York, NY	(USA)	27 Dec 92	01 Jan 93
Rotterdam	(NTH)	08 Dec 92	14 Dec 92
Port Jerome	(FRA)	05 Dec 92	07 Dec 92
Bilbao	(SPN)	01 Dec 92	03 Dec 92
New Orleans, LA	(USA)	12 Nov 92	16 Nov 92
Freeport (Bahamas)	(BAH)	07 Nov 92	09 Nov 92

Leixoes	(PTG)	24 Oct 92	26 Oct 92
Ceuta	(SPN)	16 Oct 92	16 Oct 92
Las Palmas	(CNR)	11 Oct 92	12 Oct 92
Aruba	(ARU)	–	–
Wilmington, NC	(USA)	19 Sep 92	20 Sep 92
Searsport, Me	(USA)		–
Freeport (Bahamas)	(BAH)	08 Sep 92	10 Sep 92
Portland, Me	(USA)	–	–
Freeport (Bahamas)	(BAH)	25 Aug 92	29 Aug 92
Port Canaveral, Fl	(USA)	21 Aug 92	–
Hampton Roads, Va	(USA)	17 Aug 92	18 Aug 92
Pointe-a-Pierre	(TRI)	09 Aug 92	11 Aug 92
Port Canaveral, Fl	(USA)	02 Aug 92	03 Aug 92
Pointe-e-Pierre	(TRI)	26 Jul 92	27 Jul 92
Boston, Ma	(USA)	15 Jul 92	18 Jul 92
In abt 48 56 N 09 34 W Jly 6			
New York, NY	(USA)	13 Feb 92	19 Feb 92
San Nicholas Bay	(ARU)	02 Feb 92	07 Feb 92
Panama Canal	(PAN)	31 Jan 92	Passed in from Pacific
Los Angeles, Ca	(USA)	11 Jan 92	20 Jan 92
Panama Canal	(PAN)	01 Jan 92	Passed in for Pacific
Hovic	(AVI)	26 Dec 91	26 Dec 91
Philadelphia, Pa	(USA)	14 Dec 91	17 Dec 91

EXHIBIT 5

MT MARE DI KARA MARCH /3, 1993
Port of Registry: VALLETTA
Off. No. 3068

EXTRACT FROM DECK LOG BOOK

OMISSIS

ON TODAY DATE AT ABOUT 1805 HOURS LOCAL TIME, WHILE THE BOSUN ANTONIO SAN JOSE WAS OPERATING STARBOARD PROVISION CRANE ON POOP QUARTER FOR POSITIONING AND USING IT FOR TAKING PROVISIONS, SUDDENLY, BECAUSE OF BREAKING OF TOPPING LIFT WIRE, THE CRANE FELL DOWN AGAINTS [sic] SHIPSIDE AND RAILS.

WHILE SMASHING AGAINTS [sic] RAIL THE CRANE HIT OILER ELESIO ENERIA AND THIRD ENGINEER ELPIDIO ACOSTA WHICH WERE PREPARING, SPACE FOR DRUMS ON AFTER PART OF STARBOARD BOAT DECK.

OILER ENERIA, SET UNCONCIOUS [sic] AND BLEEDING AND WAS ASSISTED IN PLACE BY OTHER CREW, MEANWHILE 3/ENGR ACOSTA WAS BROUGHT INSIDE MESSROOM ALSO UNCONCIOUS [sic]. AT ABOUT 1825 LOCAL TIME, TWO AMBULANCE ARRIVED AND BOTH WOUNDED CREW WERE SENT TO HOSPITAL.

AFTER COUPLES OF HOURS, ABOUT 2000 LOCAL, 3RD ENGR ACOSTA SENT BACK ABOARD, BECAUSE OF LIGHT CONTUSIONON [sic] RIGHT HAND AND LEFT KNEE AS RESULTING FROM X-RAYS. UNFORTUNATELY OILER ENERIA WAS TRANSFERRED FROM

LOCAL HOSPITAL OF SESTRI TO SAN MARTINO HOSPITAL IN GENOVA, BECAUSE STILL UNCONCIOUS [sic] FOR A CRACKED SKULL.

AT 2105 HOURS POLICE ON BOARD FOR INQUIRY AT ABOUT 24000 INQUIRY COMPLETED, POLICE AWAY.

OMISSIS

(SEAL)

_____Master

Capt. Francesco Giglio

Republic of the Philippines
Department of Health
NATIONAL CENTER FOR MENTAL HEALTH
City of Mandaluyong

August 8, 1994

Report on the Neuropsychiatric Evaluation of Patient ELISEO ENERIA Y ESCASINAS, As Requested

GENERAL DATA

ELISEO ENERIA Y ESCASINAS, 43 year old, male, married, Roman Catholic, Filipino, a Marine Engineer, resident of Block 7, Lot 11, Phase II, Bayanihan St., Andrea Village, Executive Homes, Cavite, was presented by his wife and a representative of Capuyan and Quimpo Law Office to the Out-Patient Division of the National Center for Mental Health, Mondaluyong City on July 11, 1994, for neuropsychiatric evaluation.

Presenting Complaints:

1. Sleepless and talking by himself till dawn.
2. Often times repetitive in his verbal productions.
3. Irritable with poor impulse control.
4. Assaultive towards wife and children.

BRIEF BACKGROUND HISTORY:

Patient had been working as a seaman for the past 17 years. Sometime in March 2, 1993, while on board a ship, a crane fell on his head and sustained multiple head injuries. He was subsequently brought to a nearby hospital in Italy. He was comatose and was found to have

sustained multiple fractures of the skull. A CT scan was made which showed fractures on the frontal, temporal, petro-mactoid, sphenoid, left zygoma and left orbital walls. In addition, a crushed third right middle finger was noted. Client chest x-ray showed perihilar congestion. Bloody discharge was noted on the ear and nose.

He was observed to exhibit seizures and was given Carbamazepine 200 mg. BID. Sometime in March 9, 1994, his condition deteriorated and a Tracheotomy was inserted. A follow-up CT scan was done on March 20, 1994 which showed a collection of liquid which was evacuated by a craniotomy drainage. His condition gradually improved and on April 25, 1994, he was met by his wife at the NAIA (Ninoy Aquina International Airport) who described him to have swollen eye, swollen vertex, supported in walking and unable to recognize her and his family.

From the airport, he was brought to the Metropolitan Hospital, probably for continued treatment and rehabilitation. He was allowed to go home sometime in June, 1993 and was advised regular follow-up. He was finally discharged on August 10, 1993 with the diagnosis of Traumatic Head Injury; S/P Burn Holing. He was then referred to the University Medical Center of the De la Salle Hospital in Cavite, for continued rehabilitation. Therapy was terminated sometime in December, 1993. He was then transferred to the undersigned for re-evaluation and management.

MENTAL STATUS EXAMINATION:

He was an adult male, child-like in general behavior, careless in his personal grooming, with poor attention span and had to be prodded in answering questions. Speech was generally perseverated as he often times repeated answers to himself. He was at times incoherent and responses were short and limited.

He was able to give his correct name but needed assistance from his wife in giving other personal data. He complained of being sleepless for quite a number of days and volunteered that at night, he talked to himself. He admitted lapses in memory. He however denied auditory as well as visual hallucinations.

He further denied the allegation by his wife that he often hurt their children. He was noted to be irritable with his wife and pinched her on the arm. Affect was inappropriate. Mood was labile. Memory was faulty. His concentration was poor and was unable to perform simple arithmetical calculations. He was disoriented to time and unaware of his environment. He was able to identify his wife. Judgment was faulty.

NEUROLOGICAL EXAMINATIONS:

He was unstable in walking and tended to fall on his left and needed assistance from his wife. Signs of regression to lower level of development was prominent and was generally disinhibited in his behavior. Poor impulse control was further noted.

Cerebral functions were abnormal. Visual aphasia was demonstrated. He was able to read some letters but

only with minimal comprehension. Facility with regards to arithmetical procedure was poor.

Cranial nerve were preserved. Motor strength are within normal limits except for mild speaticity on the left leg. Reflexes are all hyperactive.

LABORATORY EXAMINATIONS:

1. **Psychological Tests Results:** Done August 1, 1994. See enclosed report.

   Current intellectual potentials fall within the severe Mental Retardation level. Ability to think logically and render sound decision were affected. Memory for both rote and remote recall, viso-motor dexterity and organizational know-how, conceptual and perceptual skills were all below par.

   Projective data reveal a sensitive and suspicious individual who tends to react with a strong express of hostility and immaturity without social restraint because of a very ineffective basic inner control. His low frustration tolerance prevents him from making desirable decision/adjustment to people around him. Attention span was limited and thinking pattern was fragmented. He lacks that sense of objectivity which results to confusion and bewilderment.

   Marked ego disintegration secondary to neurological dysfunction was demonstrated.

2. **Electroencephalogram (EEG)** – Done on July 13, 1994. See enclosed EEG report.

   The EEG was abnormal showing a generalized slowing of the background activity as well as in the focus of intermittent slow wave seen over the left mid and posterior temporal areas. The findings suggest a possibility of a structural abnormality.

EEG classification: Abnormal significance II.

1. Background slow – generalized, left more than right.

2. Intermittent slow – focal, left temporal.

3. **Cranial C.T. Scan** – Done July 13, 1994. See enclosed report.

Compared to the C.T. scan dated May 13, 1994, done at Metropolitan Hospital, the present C.T. scan showed old infarction changes in the left basal anglia, left-fronto-temporal and occipital lobes.

Secondary atrophic dilatation of the left lateral ventricles was noted. Small old infection in the right internal capsuls was also noted.

No recent infarction or other abnormal density changes were noted in the serpia and infratontorial structures.

The left lateral ventricle and the third ventricle remain dilated. There was also a central shift from the right to the left. A linear fracture in the left frontal region was noted.

DIAGNOSIS: Post Traumatic Cerebral Injuries, Diffure.

REMARKS AND RECOMMENDATIONS:

The problem arising from the brain injury are predominantly cognitive, behavioral and social. They arise from diffuse axonal injury and damage to the frontal lobes and anterior and inferior regions of the temporal lobes. In the presence of marked frontal impairment, problems as sequencing, drive, executive control, introspection, self-consciousness and self-awareness are common. Injury to the anterior and inferior temporal lobes

usually results in major difficulties in understanding the environment.

The table below illustrates the problems following head injury:

Reduced frustration tolerance	Headache
Poor impulse control	Language disturbance
Reduced organizational ability	Depression
Memory impairment	Restlessness/Irritability
Distractibility	Apraxia
Attention difficulty	Concrete thought process
Mood liability	Reduced noise tolerance
Reduced mental and physical tolerance	Decreased insight
Spatial relation dysfunction	Reduced motivation
Unilateral body/spatial neglect	Impaired social function
Impaired problem solving ability	Altered sexual function

In regards to management, a multidisciplinary team is essential in treatment planning and provision. The loss leader is usually a neuropsychiatrist who will provide the link between the occupational therapist, social worker, speech/language therapist, physical therapist and neuropsychologist.

Treatment strategies is directed towards achieving a basic level of symptoms control. Example to such strategies are:

(1) The provision of external organization and structure. This includes basic external memory aid and identification of factors associated with

arousal, e.g., early symptoms of frustration, allowing for the individual to remove themselves from the situation before impulse control becomes an issue.

(2) Diffusing limits of tolerance in terms of type, complexity, duration and pacing of activity the individual undertakes.

(3) Biological approaches – the use of medication to manage the problem of low frustration tolerance and poor impulse control.

(4) Coordinate a rehabilitation program.

(5) Establishment of individualized self-monitoring system to allow the patient to identify specific progress.

As reported by our neurology consultant, prognosis-wise, "He will still improve but severe residuals like seizures predisposition, gait disturbance, poorly controlled motion, severely lowered intellect and fine motor skill disturbances are expected."

It is further recommended that he should be treated and rehabilitated in the United States since the Philippine set-up does not have the personnel and facilities for a comprehensive rehabilitation program.

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National Center for Mental Health
Mandaluyong City
Philippines

Republic of the Philippines
Department of Health
NATIONAL CENTER FOR MENTAL HEALTH
City of Mandaluyong

PSYCHOLOGICAL REPORT

Name:	ELISEO ENERIA
	43/Married
Birthdate:	February 12, 1951
Birthplace:	Gubat, Sorcogan
Education:	Marine Engineer Graduate
Referred For:	IQP
Referred By:	Dr. Maaba
Date Examined:	August 1, 1994

GENERAL OBSERVATION:

Testee is an adult male of fairly developed physique and average height. Clad in printed T-shirt and short pants; he appeared fairly kempt.

During the process of interview and testing proper, he was observed to have difficulty comprehending E's queries. He could hardly remember the reason why he was brought here for consultation although he was fully aware of being in comatose for 50 days after he was hit by a crane on the head but could not elaborate further. He has difficulty expressing his ideas and most of the time he talked in a repetitive manner. Conceded hearing voices and believed a lot of people had ill-attitude toward him. And that he was continuously monitored by other people. Sense of apprehension was clearly noticeable on his facial

expression. Attention could hardly sustained and was easily distracted even by minor outside stimuli. Insight was lacking. Orientation to 3 spheres were hampered.

PSYCHOLOGICAL EVALUATION:

Current intellectual potentials is classified along the Severe Mental Retardation level. Impaired mental efficiency is possibly due to the presence of marked neurological deficits. Ability to think logically and render sound decision is affected. Memory for both rote and remote recall, viso-motor dexterity and organizational know-how are hampered. Likewise, conceptual and perceptual skills are also below par.

Projective data reveal a sensitive and suspicious person who tends to read with strong expression of hostility, temper, tantrums and immaturity without social restraint as basic inner control is very ineffective if not affected. His low frustration tolerance and childish coping mechanism have not only hindered a desirable adjustment but also put stress on people around him. He tries to handle life situation through practical means but it is apparently not enough to support him as he easily gets irritated, attention; span is limited and thinking pattern is fragmented. He is inclined to lose his sense of balance even on mild provocation due to ineffective defenses. He lacks sense of objectivity which resulted in severe confusion and bewilderment. Dearth in associational process and pathological rigidity is due to an arrest of his general efficiency. Chaotic reproduction suggest marked ego disintegration secondary to neurological dysfunction.

HENEDINA L. TAYAG
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NCMH

Dott. Alberto Anzi
Specialista in Igiene
E Medicina Preventiva
Via G. D'Annunzio, 2-38 – piano 9°
Tel. 587-341 – 587-342
16121 Genova

MR. ENERIA ELISEO

(Summary of Clinical History)

Skull/face trauma and coma; C.T. showed multiple fractures (frontal, temporal, petro-masthoid, sphoenoid, left zygoma, left orbita walls with hematoma, oedema).
Crushed third right middle finger.
Chest x-rays show parailar congestion.
Left otorrage and nose liquorrage.
Treated with controlled ventilation and sedatives.
Neuro jerks slightly hyperreagent.
On March 9 normal blood tests and ECG: intubation removed.
Maxillo/facial specialist does not think necessary surgical treatment.
On March 11 conditions worsening. T.C. negative.
Tracheothomy applied.
On March 20 C.T. shows fronto temporal collection of liquid.
Surgically drained the same day.
After treatment, next day the patient appears improved.

C.T. shows disappearance of liquid collection.
Parentheral feeding performed.
See x-rays following days.
Blood tests normal and normal breathing activity.

CERTIFIED TRUE COPY:
DENKLAV MARITIME AGENCY, INC.

MADELEINE H. COLLADO
Crewing Administrator

ACT 1104

Regular Session, 1995

HOUSE BILL NO. 306

* * *

Art. 8. Jurisdiction over property; in rem

A court which is otherwise competent under the laws of this state has jurisdiction to enforce a right in, to, or against property having a situs in this state, claimed or owned by a nonresident.

* * *

Art. 9. Same; quasi in rem; attachment

A court which is otherwise competent under the laws of this state has jurisdiction to render a money judgment against a nonresident if the action is commenced by an attachment of his property in this state. Unless the nonresident subjects himself personally to the jurisdiction of the court, the judgment may be executed only against the property attached.

* * *

/s/ John A. Alario, Jr.
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

/s/ Samuel B. Nunez, Jr.
PRESIDENT OF THE SENATE

/s/ Edwin Edwards
GOVERNOR OF THE
STATE OF LOUISIANA

APPROVED June 29, 1995